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No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MURPHY OIL CORPORATION,

Petitioner,

v.

NAPH-SOL REFINING COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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QUESTIONS PRESENTED

1. Where the Administrative Procedure Act, 5 U.S.C. § 553(b)(B), requires that an agency publish with a rule a contemporaneous "statement of reasons" explaining its finding of good cause for issuing regulations without first providing notice and an opportunity for public comment, did the court of appeals err (and depart from holdings of other courts of appeals) in sustaining the agency's action on the basis of material, including that drawn from argument of agency counsel, that was not part of the statement of reasons published with the rule?

2. a. Did the court of appeals err (and depart from holdings of other courts of appeals) in holding that an agency may find good cause to adopt a rule without public notice and comment not only where an emergency requires the government to act immediately, but also where, in the absence of an emergency, the agency predicts that publication of a notice of proposed rulemaking itself will cause untoward effects?

b. Did the court of appeals err in holding that an agency may justify adoption of a rule without public notice and comment in such circumstances when any untoward effects could have been avoided, and public notice and comment nonetheless provided, if the agency had simply proposed to make any final rule effective as of the date of the proposal?

3. Is the proper scope of judicial review of an agency determination to adopt a regulation without public notice and an opportunity for comment the doctrine of "extreme deference" applied by the court of appeals in the present case?

4. Did the court of appeals err by sustaining a second agency publication of the rule, following purported notice and comment, where the court recognized that the statement of basis and purpose required by 5 U.S.C. § 553 (c) did not even mention the proposal, the rule, or any comment thereon?

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Murphy Oil Corporation respectfully petitions for a writ of certiorari to review the judgment of the Temporary Emergency Court of Appeals in *Naph-Sol Refining Company* v. *Murphy Oil Corporation*, No. 6-31, entered on December 20, 1983.[1]

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals is not yet reported, but is reproduced in the Appendix as Pet. App. A (1a-43a). The opinion of the United States District Court for the Western District of Michigan is reported at 550 F. Supp. 297 (W.D. Mich. 1982). Pet. App. B (44a-65a). The

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[1] The court of appeals consolidated oral argument of this case, No. 6-31, with *Mobil Oil Corporation, et al . v. Department of Energy*, No. 2-40, (N.D.N.Y. 1982) and issued a single opinion in both cases. The caption of this Petition contains the names of all parties to the proceeding whose judgment is sought to be reviewed. The U.S. Department of Energy filed a brief *amicus curiae* in the court of appeals. A listing of Murphy's non-wholly-owned subsidiaries and affiliates, required by Rule 28.1 of this Court's Rules, is set forth in the Appendix to this Petition as Pet. App. G (117a).

decision of the United States District Court for the Northern District of New York in the companion case of *Mobil Oil Corporation, et al.* v. *Department of Energy* is reported at 547 F. Supp. 1246 (N.D.N.Y. 1982). Pet. App. C (66a-110a).

JURISDICTION

The court below entered judgment on December 20, 1983, Pet. App. D (111a), and a timely petition for rehearing and suggestion for rehearing *en banc* was denied on February 10, 1984, Pet. App. E (112a). The jurisdiction of this Court to review the judgment below is invoked under Section 211(g) of the Economic Stabilization Act ("ESA"), 12 U.S.C. § 1904 *note*, as incorporated in Section 5(a)(1) of the Emergency Petroleum Allocation Act ("EPAA"), 15 U.S.C. § 754(a)(1), and 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553, the Federal Energy Administration Act ("FEAA"), 15 U.S.C. § 766(i)(1), and the equal application/deemed recovery rule, 10 C.F.R. § 212.83(e)(1) (1975), are reprinted in the Appendix as Pet. App. F (113a-116a).

STATEMENT OF THE CASE

Naph-Sol Refining Company ("Naph-Sol") brought this action pursuant to Sections 210 and 211 of the ESA, as incorporated in Section 5(a) of the EPAA, claiming the right to recover price "overcharges" allegedly incurred in its purchases of refined petroleum products from Murphy Oil Corporation ("Murphy") during the period October 1973-January 1981. Naph-Sol contended that Murphy's prices were in excess of the maximum allowable prices permitted under the refiner price rules of the Mandatory Petroleum Price Regulations, 10 C.F.R. § 212.81 *et seq.*, including a rule known as the "equal application/deemed recovery" rule.[2] The equal application/

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[2] Naph-Sol's complaint also contained other allegations of regulatory and contractual violations. These other counts are not relevant here.

deemed recovery rule was published by a predecessor of the Department of Energy on September 5, 1974, without prior notice or an opportunity for public comment. The rule imposed substantial penalties on petroleum refiners (and resellers) which, in response to competition and improving supply conditions, charged prices *below* maximum allowable levels to some, but not all, of their customers. The basis for the agency's determination that it could adopt the rule without first providing notice and an opportunity for public comment was its unsupported speculation that advance notice of the proposed amendment would "highlight" alleged "ambiguities" in the existing regulations, which could lead some sellers to take advantage of the "ambiguity" by lowering prices to some, but not all, of their customers, a practice which the agency believed would be "injurious to the public welfare."

The district court, consistent with the decisions of the chief judges of the two other district courts that had independently reviewed the equal application/deemed recovery rule, held that the agency's failure to follow proper rulemaking procedures invalidated the regulation. The district court found that circumstances at the time did not rise to the level of an emergency which would have justified waiver of notice and comment procedures. The district court also rejected the argument that the equal application/deemed recovery rule was "repromulgated" in a rulemaking commenced on September 10, 1974 and concluded on December 5, 1974, holding that the December 5 publication did not contain an adequate statement of the basis and purpose for retaining the rule.

The Temporary Emergency Court of Appeals ("TECA") reversed the decision of the district court. According "extreme deference" to the agency's "forecast" concerning the potential adverse consequences of giving advanced notice of the proposed rule, TECA concluded that the agency had good cause for dispensing with public rulemaking procedures. In so doing, TECA allowed the agency to support its position with material outside the record of the September 5, 1974 rulemaking. TECA also held that, even if the September 5, 1974 promulga-

tion was procedurally invalid, its infirmities were "cured" by the September 10, 1974 rulemaking which, in the Court's opinion, resulted in the "repromulgation" of the equal application/deemed recovery rule on December 5, 1974. Moreover, TECA held that the absence of an explicit statement of the rule's basis and purpose was not fatal to the December 5, 1974 "repromulgation" since the agency's reasons for repromulgating the rule were "reasonably clear" to the court notwithstanding the lack of any explanatory material contained in that notice. In a notice published later in December 1974, however, the agency noted that it had not yet decided what to do about the September 10 proposal.

Murphy filed a Petition for Rehearing and a Suggestion for Rehearing *En Banc* on January 23, 1984. TECA denied that petition on February 10, 1984. Pet. App. E (112a).

A. Regulatory Background

While the details of the refiner price rules are complex, the theory of their operation is relatively simple.[3] Through a complicated formula which allowed refiners to pass through their increased costs, the regulations established maximum prices that refiners could charge in their sales of "covered products," including motor gasoline.[4] The regulations, however, did not require refiners to charge the maximum prices allowed under

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[3] A detailed explanation of the operation of these regulations is set forth in the opinion of the court of appeals. Pet. App. A (4a-12a) Basically, the regulations provided that a refiner "could not charge any class of purchaser a price in excess of the base price" of a particular covered product, except under certain circumstances not relevant here. 10 C.F.R. § 212.82 (1975). The "base price" of a covered product was "the weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973, plus increased product costs incurred between the month of measurement and the month of May 1973 . . ." 10 C.F.R. § 212.82(f)(1)(i)(1975).

[4] The price rules governing gasoline prices were promulgated in 1973, 38 Fed. Reg. 22536 (August 22, 1973), and were rescinded by President Reagan on January 27, 1981, Executive Order No. 12287, 46 Fed. Reg. 9909 (January 30, 1981).

the refiner price rules or to recover all of their increased costs immediately after they were incurred. Rather, a refiner was entitled, once it established its maximum prices for sales of a covered product, to charge those prices or any lower price. If a refiner charged prices lower than the maximum, or for some reason was unable to recover all of its increased costs in its actual selling prices, the refiner was entitled to carry forward, or "bank," its unrecovered increased costs for inclusion in the computation of maximum prices for the next month. 10 C.F.R. § 212.83(e)(1)(1975). The ability to bank increased costs for future recovery meant that costs need not be passed on to consumers immediately. The banking of unrecovered increased costs lies at the heart of Naph-Sol's claims that it was overcharged by Murphy under the equal application/deemed recovery rule.

1. The September 5, 1974 promulgation of the equal application/deemed recovery rule.

On September 5, 1974, the Federal Energy Administration ("FEA"), a predecessor to the Department of Energy, promulgated an amendment to the banking regulation without providing prior notice or an opportunity for public comment. 39 Fed. Reg. 32307 (September 5, 1974). The amendment, known as the "equal application/deemed recovery" rule, penalized refiners and resellers which charged prices below maximum allowable levels to some customers while charging higher (*i.e.*, up to the maximum) prices to other customers. The rule generally provided that, in calculating the amount of increased costs available for passthrough in succeeding months, a refiner (or a reseller) was to pretend that the highest increment of increased costs included in the price charged to any *one* customer of a covered product was included and recovered (albeit fictitiously) in the prices charged to *all* customers of the product.[5] This deeming of fictitious cost recoveries reduced the amount of unrecouped increased costs that could be banked

[5] The full text of the September 5, 1974 amendment is reprinted at Pet. App. F (115a-116a).

and included in prices charged in future months. The effect of the equal application/deemed recovery rule, then, was to preclude a seller from ever recovering a portion of the increased costs it had incurred.

In promulgating the equal application/deemed recovery rule, FEA resorted to its frequent practice of waiving prior notice and an opportunity for public comment on the basis of an alleged emergency. This "emergency" was claimed to have arisen because: (1) the agency had "only recently" learned that sellers, responding to increased supplies, were charging prices below maximum allowable levels that did not reflect an equal application of costs among different classes of purchaser; (2) immediate action remedying "current ambiguities in the regulations" was necessary to stop "circumvention of FEA regulations"; and (3) notice and comment procedures, by "highlighting" the regulatory "ambiguities," would enable sellers to "take advantage of" the ambiguities during a comment period. 39 Fed. Reg. at 32307. The agency then simply asserted, without explanation or factual support, that the "continuation or initiation" of the pricing practices at issue would be "injurious to the public welfare, in view of the number of circumventions of FEA regulations and substantial compliance difficulties which would result." *Id.*

2. The purpose and effect of the equal application/deemed recovery rule.

By imposing substantial penalties for unequal cost pass-throughs, the equal application/deemed recovery rule sought to discourage the allegedly discriminatory pricing practice permitted by the existing regulations, wherein suppliers could reduce prices to certain customers while charging other customers higher prices up to the maximum permitted by the regulations. 39 Fed. Reg. 32306, 32307 (September 5, 1974).[6]

[6] Notwithstanding this claim, it is clear that the agency's existing regulations, as well as the anti-trust laws, already prohibited such pricing practices. For example, 10 C.F.R. § 210.62(b) prohibited "any form of discrimination among purchasers" which had "the effect of frustrating or impairing the objectives [of the EPAA]."

Although the rule ostensibly intended only to prevent price discrimination, the rule turned out to be much more onerous since it apparently also penalized sellers which mistakenly or inadvertently increased some prices more than they increased other prices. This inequitable (and apparently unintended) result of the equal application/deemed recovery rule is vividly illustrated by Naph-Sol's allegations that it was overcharged by Murphy in violation of the regulation.

Naph-Sol's "overcharge" claims are not based on any sales in which it was a disfavored customer that was discriminated against by Murphy as a result of having been charged prices which reflected a disproportionate amount of Murphy's increased costs. Quite the contrary. Naph-Sol insists that it is entitled to a refund because Murphy accidentally charged *other* customers prices which included a higher cost increment than the prices which Murphy charged Naph-Sol.[7] Under this theory, Murphy is deemed to have recovered the higher increment of increased costs mistakenly charged to *other* customers in its sales to *all* customers, including Naph-Sol. This deeming of fictitious cost recoveries retroactively reduces (and frequently eliminates) the banks of unrecouped increased costs which Murphy had available to support the prices it charged Naph-Sol.

3. The September 10, 1974 proposed rulemaking.

Just five days after it adopted the equal application/deemed recovery rule, FEA, in a notice of a proposed "comprehensive

[7] This occurred because some independent businessmen who were Murphy-branded commission dealers and bulk plant operators occasionally disregarded Murphy's pricing guidelines and charged prices in excess of those authorized by Murphy. Where such transgressions were identified, Murphy typically ordered the offender to reduce prices in a subsequent period in order to refund the overrecovery to those customers which received the unauthorized price increase. Supplemental Appendix on appeal at 000049-50, 000067-69, 000075, 000126-127.

revision" to the price regulations, expressed its awareness that the equal application/deemed recovery rule:

> is responsible for an inflexibility in the price regulations which becomes more troublesome and causes more dislocations in the market as supplies of petroleum products increase and there is greater need for the price mechanism to begin to play its customary role in the markets.

39 Fed. Reg. 32717 (September 10, 1974). The agency noted, for example, that the rule "runs counter to the interest of independent regional marketers" in certain circumstances and that it "can have results that appear to be at odds with the objectives of the EPAA." *Id.*[8] Accordingly, the agency therefore

> concluded that the inflexibility of the equal application requirement should be modified . . . to take such problems into account. However, to the extent that the current requirement serves to protect the independent sector of the market, FEA has concluded that it must be retained.

Id. FEA then proposed two limited amendments to the equal application/deemed recovery rule, as well as numerous modifications to other price regulations.

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[8] The very independent segment which FEA asserted must be protected by the rule has been the most frequent challenger of it. In Olympian Oil Co. v. FEA, Civil Action No. C-77-2196-WAI (N.D. Cal., filed September 30, 1977), an independent marketer filed a class action on behalf of all marketers claiming, *inter alia*, that the equal application/deemed recovery rule was procedurally invalid. The district court certified Olympian as a proper representative of this class. The two largest associations of independent marketers (The Society of Independent Gasoline Marketers of America and the National Oil Jobbers Council) participated as *amici curiae* supporting Olympian.

Independent marketers individually have also challenged the validity of the deemed recovery rule in litigation, *e.g.*; Lakes Gas Company v. DOE, 477 F. Supp. 187 (D. Minn. 1979); Western Petroleum Company v. DOE, No. 3-80-626 (D. Minn. 1981), and in DOE enforcement proceedings, *e.g.*; Imperial Refineries Corp., 9 DOE ¶ 83,035 (1982); St. Louis Fuel and Supply Co., 10 DOE ¶ 83,004 (1982), on virtually the same grounds as those raised here.

4. The December, 1974 notices.

On December 5, 1974, FEA adopted several of the changes to the price regulations it had proposed on September 10, 1974 and, in publishing the amended regulations, republished the equal application/deemed recovery rule without modification. 39 Fed. Reg. 42368 (December 5, 1974). The regulatory preamble made no mention of the rule or any comments received in response to the agency's September 10 proposals to amend the rule. Instead, the preamble stated that "those possible revisions which have not been acted on continue to be under active consideration." *Id.* Nineteen days later, in a notice adopting several more of the amendments proposed on September 10, 1974, FEA specifically stated that it had "not yet completed its analysis of [the September 10] proposal" to modify the equal application rule. 39 Fed. Reg. 44407, 44410 (December 24, 1974).

5. The November 3, 1980 revocation of the equal application/deemed recovery rule.

After FEA adopted the equal application/deemed recovery rule, it was criticized for discouraging refiners and resellers from competitively reducing their prices. This criticism continued until the Department of Energy ("DOE") finally proposed to eliminate the rule in its entirety. 45 Fed. Reg. 44238 (June 30, 1980). After considering the comments of interested parties, including many independent marketers and the Antitrust Division of the Department of Justice (which were adverse to the rule), DOE revoked the equal application/deemed recovery rule for all sales of gasoline, concluding that "by reducing the regulatory restraints associated with the equal application rule, we are fostering competition in the marketplace, minimizing regulatory interference with market mechanisms, and promoting economic efficiency." 45 Fed. Reg. 72626, 72628 (November 3, 1980).

B. The Decision Of The District Court

On October 1, 1982, Judge Douglas W. Hillman granted summary judgment in favor of Murphy on Naph-Sol's equal

application/ deemed recovery rule violation cause of action, holding that Naph-Sol was not entitled to recover overcharges since the equal application/ deemed recovery rule was procedurally invalid. The district court concluded that the agency lacked good cause to issue the rule without notice or comment, finding that "there were no compelling circumstances surrounding the discriminatory pricing practices cited by the agency, or discernible to this Court, to justify waiver of formal rulemaking procedures." 550 F. Supp. at 322-333, Pet. App. B (60a).[9] Judge Hillman rejected as pure speculation Naph-Sol's argument that pricing decisions by sellers during a brief notice and comment period would have had a severe economic impact on the national economy. Additionally, the district court held that the equal application/deemed recovery rule was not validly repromulgated since the December 5, 1974 rulemaking did not include an adequate statement of the basis and purpose for retaining the rule, as required by 5 U.S.C. 553(c). § 550 F. Supp. at 325, Pet. App. B (64a).

3. The Decision Of The Court Of Appeals

On appeal, TECA reversed the district court's decision and the decision in the *Mobil* case. TECA excused the agency's waiver of the notice and comment procedures required by Congress based solely on the agency's unsupported speculation—which TECA declined to "second guess"—that adverse consequences might flow from the act of notice. Pet.

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[9] Chief Judge Devitt in Lakes Gas Co. v. DOE, 477 F. Supp. 187 (D. Minn. 1979), and Chief Judge Munson in Mobil Oil Corp. *et al.* v. DOE, 547 F. Supp. 1246 (N.D.N.Y. 1982), also had previously reached the same conclusion. In the *Mobil* decision, Judge Munson, after a thorough examination of the rulemaking record, concluded that:

> To maintain that an agency action in furtherance of regulatory objectives amounts to "good cause" would be to engraft the general rulemaking requirements onto the exception. In order to have warranted this suspension of normal rulemaking procedures under the "good cause" exception, there must have been some type of exigency. Here, there [were] no compelling circumstances surrounding the discriminatory pricing practices cited by the agency.

547 F. Supp. at 1269, Pet. App. C (107a-108a).

App. A (29a-31a). Thus, without engaging in any independent review of the record to determine if the agency's fears were justified, TECA simply accorded "special deference" to the agency's "predictive judgment" that a notice period would be harmful. *Id.* at 30a. Moreover, since the explanation given by the agency in the September 5, 1974 notice clearly was inadequate to support a "good cause" finding, TECA looked to materials outside the September 5, 1974 record to find good cause for excluding the public from the rulemaking process, including the agency's subsequent proposal to modify the rule and the *post hoc* rationalizations of the agency's litigation counsel. Pet. App. A (27a, 30a-32a).

TECA further held that, even if the September 5, 1974 promulgation of the equal application/deemed recovery rule was procedurally invalid, any infirmities were "cured" by the rulemaking commenced on September 10, 1974 and concluded on December 5, 1974. Pet. App. A (33a). TECA found that the agency's September 10 proposal to *amend* the equal application/ deemed recovery rule also constituted a proposal to *abolish* the equal application/deemed recovery rule. *Id.* at 34a. Based on this determination, TECA concluded that refiners had been given an opportunity "to urge (the rule's) repeal." *Id.* at 35a. In other words, the agency on September 10, 1974 had concluded that the rule was both sufficiently necessary that emergency rulemaking procedures could be invoked and sufficiently detrimental that the rule should be abolished.

Finally, TECA found that the agency had set forth in the December 5, 1974 preamble a sufficient statement of the basis and purpose for repromulgating the equal application/deemed recovery rule, despite the fact that the agency in that notice never mentioned the rule, any comments received, or any reasons for retaining the rule. Pet. App. A (36a-38a). TECA concluded that even a "non-existent" basis and purpose statement is adequate where "the agency's path may reasonably be discerned" by the reviewing court. *Id.* at 37a. In the opinion of the court of appeals, the agency's reason for retaining the equal

application/deemed recovery rule was "reasonably clear." *Ibid.*[10]

REASONS FOR GRANTING THE WRIT

In a departure from its narrow jurisdiction over certain energy matters, the Temporary Emergency Court of Appeals has written an opinion that will widely affect rulemaking proceedings under the Administrative Procedure Act. Reversing two district courts, the court of appeals recognized that it was greatly expanding the circumstances in which an agency may find "good cause" to adopt a regulation without notice, opportunity for comment, or public participation. At the same time, the court of appeals held that an agency may support its finding of good cause with material and government counsel's arguments outside of the "statement of reasons" that the Administrative Procedure Act, 5 U.S.C. § 553(b)(B), provides must accompany the publication of a regulation adopted without notice or comment. To compound the problem, the court of appeals announced a doctrine of "extreme deference" to the agency's subsequently developed rationale on judicial review, thus further reducing the accountability of agencies that dispense with notice and comment.

The court also sought to buttress its conclusion by holding that the rule in question was subsequently validly adopted following notice and comment. But when the rule was reissued, the agency failed to provide any statement of basis and purpose (required by 5 U.S.C. § 553(c)) concerning it. The court of appeals upheld the repromulgation, holding that it could nonetheless "discern" what the agency's rationale was. This conclusion flies in the face of this Court's decision in *Motor*

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[10] This conclusion contradicts the contemporaneous agency statement, made nineteen days after the December 5, 1974 amendments, that it had not yet completed its analysis of the September 10, 1974 proposal to modify the equal application/deemed recovery rule. Although Murphy pointed out this inconsistency to the court in its Petition for Rehearing, TECA denied the Petition without commenting on the discrepancy. Pet. App. E (112a).

Vehicle Manufacturers' Association v. *State Farm Mutual Automobile Insurance Co.*, 103 S. Ct. 2856 (1983).

Certiorari is warranted for two reasons. First, the court of appeals' holdings conflict with those of other courts of appeals and this Court. Second, the expansion of agencies' ability to adopt rules without public participation, and the simultaneous and severe constriction of the scope of judicial review of such agency actions, are of profound importance to the administration of the Administrative Procedure Act.

I. THE COURT OF APPEALS HAS IMPROPERLY EXPANDED THE SCOPE OF SECTION 4(b)(B) OF THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 553(b)(B).

Section 4(b)(B) of the Administrative Procedure Act, 5 U.S.C. § 553(b)(B), permits a federal agency to adopt a regulation without first providing notice and an opportunity for public comment when it finds that notice and comment are "impracticable, unnecessary, or contrary to the public interest" and "incorporates the finding in a brief statement of reasons therefor in the rules issued." The court of appeals largely did away with agencies' statutory obligation to explain the basis for their findings under this section and the courts' obligation to review the justification of that use. These holdings conflict with holdings of other courts of appeals, and at least with the reasoning of this Court's holding in *Motor Vehicle Manufacturers' Assn.* v. *State Farm Mutual Automobile Insurance Co.*, 103 S. Ct. 2856 (1983). Moreover, the decision is of great importance because of the pervasive role of notice-and-comment rulemaking and the ever-present temptation to agencies to act without public participation and without explaining the basis for their actions. This Court has spoken strongly on these subjects in *Motor Vehicle Manufacturers' Association*, where the agency had purported to follow the notice-and-comment procedures. However, *Motor Vehicle* did not discuss the use of section 553(b)(B) of the APA to avoid notice and comment altogether. The decision of the court below, unless reversed, will surely be relied upon by agencies seeking to use

the good cause exception as the "escape clause" from the notice-and-comment requirements that Congress feared. S. Rep. No. 752, 79th Cong., lst Sess. (1945), *reprinted in* Administrative Procedure Act: Legislative History, 79th Cong., 2d Sess. at 200 (1946).

A. The Court Of Appeals Upheld Use Of Section 553(b)(B) Even Though The DOE Had Not Provided A Statement Of Reasons That Supported Its Conclusion That Notice And Public Comment Were Against The Public Interest.

A clear and explicit requirement of section 553(b)(B) is that a federal agency invoking it "incorporate[ ] the finding in a brief statement of reasons therefor in the rules issued . . . ." The Ninth Circuit has held that this language means what it says and that materials not published with the rule should not be accepted by a court where the statement published with the rule is missing or inadequate. *Buschmann* v. *Schweiker*, 676 F.2d 352, 356-357 (9th Cir. 1982). *Accord, Kelly* v. *United States Department of Justice*, 339 F. Supp. 1095, 1100-1101 (E.D. Cal., 1972) (3-judge court). As Judge Friendly has expressed it for the Second Circuit:

> Congress could well have wished to require an agency to address its mind to whether a case fell within the exceptions before it committed itself to final regulations, not after it had done so without complying with 5 U.S.C. § 553(b) and (c) procedures and thereby created a need for self-justification.

National Nutritional Foods Assn. v. *Kennedy*, 572 F.2d 377 (2d Cir. 1978) *(dictum).*

In the present case, the court of appeals held the opposite; it explicitly upheld the DOE's position on the basis of material that was not published along with the regulation on September 5, 1974.

The court did this in two ways. First, it acknowledged that the September 5 regulatory preamble made no mention of who would be injured by promulgation of a proposed rule or how

that injury could occur. Pet. App. A (32a). It held, however, that something the agency later said could fill in this gap in the preamble. *Ibid.* This flatly contravenes the requirement of section 553(b)(B) that the explanatory statement of reasons be "incorporate[d] . . . in the rules issued." The court of appeals sought to excuse this violation of the statute by pointing out that the statement that it used to supplement the inadequate September 5 preamble was issued by DOE only five days later, on September 10, as part of the notice of a proposal to modify the deemed recovery rule; the court said that this was a "contemporaneous statement," and not "made for litigation." Pet. App. A (32a).

In addition to simply departing from the terms of the statute, the difficulty with this approach is obvious. The September 10 notice says nothing about the decision to adopt the deemed recovery rule without notice and comment. It does not purport to support that issuance. There is no way of knowing from the record whether the material in the September 10 proposal was thought by the agency at the time to support the September 5 decision to adopt the rule without notice and comment. Thus, while the September 10 preamble may not be "made for litigation," the government's decision to offer it as pertinent to and supportive of the earlier promulgation is not supported in the record and *was* "made for litigation." It is the argument of the agency's litigation counsel alone that identifies matters in the September 10 preamble as supporting the September 5 decision.[11] This is impermissible. *See Motor Vehicle Manufacturers Assn, supra,* 103 S. Ct. at 2870; *cf. Citizens To Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 419 (1971).

The second improper way in which the court of appeals upheld the September 5 rulemaking was by relying on assertions from DOE counsel that were not reflected in the record

[11] And, as we show below (at fn. 12), agency counsel only adopted this rationale after it became clear that the agency's original rationale—that actually expressed in the September 5 publication—proved to be legally inadequate.

anywhere. All the agency said on September 5 was that "announcement of these amendments as proposals would highlight current ambiguities in the regulations and could result in sellers seeking to take advantage of that ambiguity or of the contract exception to the regulations." 39 Fed. Reg. at 32307. The September 10 statement said coincidentally that the rule, the agency thought, would serve to protect independents and unspecified areas of the country. The agency's counsel made arguments that went much further than these bland statements, and the court of appeals accepted them. It found that, if a proposed rule were issued, refiners could "threaten the competitive viability of the independents" by "passing through proportionately greater costs to independent outlets." Pet. App. A (27a). The court also held that "refiners would seek to take advantage of the 'contract exception' to the deemed recovery rule and 'grandfather in' unequal cost pass-throughs to refiner operated stations by entering into long-term contracts." *Id.* It concluded that "severe market dislocations and erosion of the class of purchaser scheme so central to the Price Regulations" would result from notice and an opportunity for public comment. *Ibid.*

None of these dire results was predicted or referred to by the agency either in the preamble accompanying the promulgation of the rule, the September 10 preamble, or anywhere else, before this issue began to be litigated.[12] Neither preamble

[12] The public record shows that agency counsel concocted this explanation relatively recently. In 1979, in defending the validity of the deemed recovery rule against a refiner's procedural attack in Coastal Corp. v. DOE, No. 78-549 (D. Del.), the government used reasoning drawn directly from the September 5, 1974 promulgation: "the agency specifically found that an emergency situation existed which required immediate guidance to prevent circumvention of regulations central to the realization of EPAA objectives." DOE Brief on Summary Judgment at 28. TECA then disapproved this "immediate guidance" rationale in another context (Mobil Oil Corp. v. Department of Energy, 610 F.2d 796 (TECA 1979, *cert. denied*, 446 U.S. 37 (1980)); *see* Pet. App. A (28a fn. 19). DOE then settled the *Coastal* case.

Thus, the rationale accepted by the court of appeals in the present case was not only not present in the preamble to the promulgation of the original rule, it was not even formulated by the agency's counsel until after it was clear that the original "immediate guidance" rationale would not work.

mentions, or even hints, at threats to "competitive viability," "severe market dislocations," or the other results conjured up by the government and accepted by the court. Yet it is these unsupported conclusions, rather than what is in the record, on which the court relied in sustaining the agency.Pet. App. A (27a, 30a-31a). Even the court of appeals did not hold that the bare record supports the action.[13]

B. The Court Of Appeals Impermissibly And Unnecessarily Broadened The Scope Of The "Good Cause" Exception.

The court of appeals also ignored other major restraints on the exercise of authority under section 553(b)(B). In doing so, it clearly placed itself at odds with the uniform interpretation of the section by other courts of appeals.

In enacting the Administrative Procedure Act, Congress provided only very limited circumstances in which an agency might avoid the general, and clearly beneficial, obligation to provide public notice and obtain comment from affected persons before issuing a final rule. Congress insisted that there be a true necessity or emergency and that "the due and required execution of agency functions would be *unavoidably* prevented by its undertaking public rulemaking proceedings." S. Rep. No. 752, 79th Cong., lst Sess. (1945); *reprinted in* Administrative Procedure Act: Legislative History, 79th Cong., 2d Sess. at 200 (1946) (emphasis added). Thus, the situation must be so threatening that an agency must have no choice but to

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[13] The court of appeals did offer the assertion that the agency is entitled to deference in assessing and predicting impacts of its actions. Pet. App. A (29a-30a). If this was offered in support of its extravagant stretching of the record, the court's discussion misses the point completely. The agency's reasons for avoiding notice and comment, whether those reasons be predictive or not, must be stated "with the rule" when it is published. Here the court of appeals gave deference not to the reasons the agency gave for dispensing with public notice and comment when the rule was promulgated; rather the court deferred to the additions to and elaborations of the published record that were provided by the agency's litigation counsel.

adopt a rule immediately, without time for public notice and comment, in order for that step to be justified. *E.g.*, *United States Steel Corporation* v. *Environmental Protection Agency*, 649 F.2d 572 (8th Cir. 1981); *State of New Jersey* v. *Environmental Protection Agency*, 626 F.2d 1038 (D.C. Cir. 1980); *National Nutritional Foods Association* v. *Kennedy*, 572 F.2d 377 (2d Cir. 1978).

The court of appeals here went beyond these holdings, as its opinion recognizes. Pet. App. A (28a-29a). The court held that the good cause exception also reaches situations in which no emergency or exigent circumstances exist at the time the regulation is issued. Rather, it held, "good cause" can also be found where the agency believes that issuance of a proposed rule will create untoward effects. The court held that, where the "very announcement of a rule can be expected to precipitate activity by affected parties that will harm the public welfare," dispensing with public notice and an opportunity for comment is justified. Pet. App. A (28a). There is no precedent for this outside of TECA. Indeed, the court itself recognized that this ruling is a new departure that may "become an all purpose escape-clause." Pet. App. A (28a-29a). Agencies cannot be expected to resist the temptation to claim that a notice of proposed rulemaking suggesting the existence of a problem or proposing to curb or to promote some kind of behavior would itself have an impact on persons who would be adversely affected should a rule become effective. The broad new justification for issuance of rules without notice or any opportunity for members of the public to comment demands review by this Court.

This is all the more so because there was a way for the agency both to protect against any injury that might have resulted from publishing notice and still to engage in the full notice-and-comment procedure. The agency could have published notice of the proposed rule, solicited public comment, and provided in the notice that the effective date of the rule, if adopted, would be the publication date of the original proposal. This would have discouraged anyone from taking advantage of the propos-

al, while still allowing affected persons to comment on the proposal and have those comments considered by the agency. This procedure had been used by the agency, and approved by the court of appeals, before promulgation of the deemed recovery rule. *California* v. *Simon*, 504 F.2d 430 (TECA 1974), *cert. denied*, 419 U.S. 1021 (1974).

The court of appeals did not disagree that this device would have satisfied concerns over persons taking advantage of a proposal while still permitting notice and comment. Rather, the court invoked this Court's decision in *Vermont Yankee Nuclear Power Co.* v. *Natural Resources Defense Council, Inc.* 435 U.S. 519 (1978), as forbidding the court of appeals from so holding. Pet. App. A (31a fn. 21).

This misinterprets the *Vermont Yankee* holding. As we have seen, Congress insisted that public notice and an opportunity for comment be provided unless the agency is "*unavoidably* prevented" from doing so. S. Rep. No. 752, *supra*. If there is a means for an agency to prevent injury and still provide notice and comment, then it must use that means. A holding to that effect would keep the good cause exception narrow and enforce the availability of the important rights of public participation provided in the APA just as Congress intended; it would not add new rights in the manner disapproved in *Vermont Yankee*. Congress did not intend that agencies should have a choice of either providing notice and comment or making the proposal effective without notice or comment.[14]

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[14] The court of appeals held, curiously, that Murphy's argument that the agency could have solved its problem by making the proposed rule effective, if finally promulgated, on the date of proposal "proved too much since it would swallow the good cause exception as we have interpreted it in Nader v. Sawhill [514 F.2d 1064 (TECA 1975)] and De Rieux v. Five Smiths, Inc. [499 F.2d 1321 (TECA 1974), *cert. denied*, 419 U.S. 896 (1975)]." Pet. App. A (31a fn. 21). In those cases, the court of appeals made similar holdings in circumstances that it recognized here were more exigent than those of the present case. Pet. App. A (29a). But if the effective date device would have allowed notice and comment without injury to the public, those holdings should be "swallowed."

C. The Court Of Appeals Drastically And Improperly Limited Judicial Review.

The court of appeals has also made it too easy for agencies to invoke the broadened "good cause" exception. The doctrine will thus become the very "all purpose escape-clause" that the court was concerned about. The court held that the agency cannot find good cause to avoid notice and comment unless publication of a notice would cause a "significant threat of serious damage to important public interests." Pet. App. A (29a). But it immediately watered down that phrase (so that the facts of this case, in which no such thing was shown, could be fit in). The court announced a rule of "*extreme* deference" to agency predictions and "forecasts" about what kind of injury could result from announcement of a proposed rule. Pet. App. A (30a). This represents a major opportunity for agencies to adopt regulations without providing notice and comment and to avoid meaningful judicial review.

The undisputed record shows just how uncritical the court of appeals was in examining the record. First, in September 1974 there already existed an FEA regulation providing that "[n]o supplier shall engage in any form of discrimination among purchasers of any allocated product." 10 C.F.R. § 210.62(b), 39 Fed. Reg. 5311 (February 12, 1974).[15] Moreover, predatory

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Indeed, in *Nader* v. *Sawhill*, the court held that it had reached the limit of the good cause exception of section 553(b)(B). It said that in "less calamitous" circumstances it would not approve the use of the exception where the problem was behavior anticipated as the result of publishing a notice of proposed rulemaking. 514 F.2d at 1068. In the present case, the court of appeals acknowledged that the circumstances were less calamitous, Pet. App. A (29a), but approved the avoidance of notice and comment anyway. This demonstrates the power of the court's reasoning to extend itself into less and less urgent circumstances.

[15] The existence of this regulation banning discrimination by sellers is no doubt part of the reason why the agency attempted originally to defend the September 5 promulgation as merely providing "immediate guidance" and clearing up "ambiguities" in the existing regulations. As pointed out in footnote 12 above, it was only when it became clear that that line of argument would fail that agency counsel switched to the new assertions deferentially accepted here by the court of appeals.

pricing and other forms of price discrimination had long been prohibited by the Sherman Act, 15 U.S.C. § 2, and the Robinson-Patman Act, 15 U.S.C. § 13. Although these prohibitions were called to the court's attention, neither the agency nor the court explained why publishing notice would have caused an emergency despite these existing prohibitions.

Second, the condition that the agency asserted gave rise to the need for the deemed recovery rule was the return of the supply of crude oil to normal conditions after the end of the Arab oil embargo period. The agency said—in a classic oxymoron of regulator's vision—"as the supply situation becomes more favorable, the incentive to depart from the [regulations] becomes greater." 39 Fed. Reg. at 32307 (September 5, 1974). The practices that the agency feared—suppliers' cutting prices to some customers—were normal and beneficial competitive practices made possible again with a more normal marketplace. The court did not inquire or discuss why a return to more normal competitive conditions was cause for alarm.[16]

Third, there was a strong indication—utterly ignored by the court—that the conduct that the agency said it feared from publication of notice would not in fact have materialized. The September 5 preamble itself said that "some" sellers already believed that the regulations did not already prohibit the practices said to be feared (39 Fed. Reg. at 32307, Col. 1). The administrative record showed that the agency had known of such practices for more than a month and a half before the

[16] Actually, the court of appeals took refuge in a bit of disingenuousness on this score. It described the supply situation in September 1974 as "volatile," Pet. App. A (30a), suggesting that it was fluctuating. That was incorrect; the supply situation was steadily improving, and even the agency never claimed that it was "volatile." Moreover, such a claim would have been illogical as a basis for this rule. A supplier does not cut prices to any customer when supplies are or threaten to become tight. No "discrimination" occurs in such circumstances. Rather, the agency here saw the problem as one of maintaining the rigidities of controls when supplies and competitive practices were getting back to normal.

September 5 promulgation of the deemed recovery rule.[17] If the effects of such behavior would have been as catastrophic as the court believed, there would have been examples of catastrophe adduced in the September 5 preamble or elsewhere, or some explanation of why they were lacking. The court was silent on this point as well.

Fourth, unlike other agencies, which are required to provide 30 days after notice for comments, the FEA was allowed by section 7(i)(B) of the Federal Energy Administration Act to cut this period to 10 days. Thus, a full rulemaking, with effort by the agency, could have been completed in less than a month. It is difficult to imagine how, with normal or near-normal supply, selective discounting could have the disastrous effects predicted by the court in such a short time. The court of appeals paid no attention to this point.

In sum, we submit that the "extreme deference" paid by the court of appeals to the agency's rationale effectively abdicates any significant judicial control or review over the agency's extension of the "good cause" rationale, and creates the very all purpose escape clause to the restrictions of section 553(b) that the court said it was avoiding.

II. THE COURT OF APPEALS IGNORED THIS COURT'S HOLDING IN *MOTOR VEHICLE MANUFACTURERS' ASSOCIATION* v. *STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY*.

The court of appeals (perhaps concerned that its reliance on the September 5 promulgation was not well placed) sought to buttress its holding by concluding that on September 10, 1974, the agency proposed to eliminate the deemed recovery rule, accepted comments and, having considered the comments, validly repromulgated the rule as part of a broader promulgation on December 5, 1974. Pet. App. A (33a-38a).

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[17] Memorandum of Sigmund L. Sklar, head of FEA's refiner audit unit, of July 18, 1974. The memorandum described this issue as one "upon which we now have a position and are prepared to move." Supplemental Appendix on appeal at p. 765.

In so holding, the court of appeals simply ignored this Court's holding in *Motor Vehicle Manufacturers' Association* v. *State Farm Mutual Automobile Insurance Co.*, 103 S. Ct. 2856 (1983) since the regulatory preamble published on December 5 did not mention the deemed recovery rule at all. There was no "statement of basis and purpose" (as required by 5 U.S.C. § (c)) for adoption of that rule; no comment or issue raised during the comment period was mentioned. The court of appeals acknowledged that this was the case, holding that "even when the basis and purpose statement is cursory, or, indeed, non-existent, a rule may be upheld when the agency's path may reasonably be discerned." Pet. App. A (37a).

This is directly contrary to this Court's holding in *Motor Vehicle Manufacturers' Association* that in informal rulemaking "the agency must examine the relevant data and *articulate a satisfactory explanation* for its action, including a 'rational connection between the facts found and the choice made' " 103 S. Ct. 2866-2867 (emphasis added; citation omitted). This Court also held, quoting *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947), that a reviewing court " 'may not supply a reasoned basis for the agency's action that the agency itself has not given'." 103 S. Ct. at 2867.

Nonetheless, the court of appeals held that the absence of any statement from the agency was not fatal since the court could "reasonably discern[]" why the agency had adopted the rule despite all the unfavorable comments: "the agency concluded that the needs of regions and independents outweighed the benefits of price flexibility." Pet. App. A (37a).

This is unacceptable for two reasons. First, it is no more than saying that the agency decided to adopt the rule because it thought that it was better to have the rule than not to have it. That judgment can always be "discerned" from the fact that the rule has been adopted. If that is all that is necessary, then no agency ever need explain why it has adopted a rule or pay any attention to this Court's *Motor Vehicle Manufacturers' Association* decision again.

Second, the record reveals with clarity that the agency had not even made the hypersimplified conclusion that the court of appeals "discerned" that it had. Several weeks after the agency made the December 5 non-statement in which the court of appeals felt that it could discern the basis for an agency decision, the agency published another rulemaking, concerning natural gas liquids, *in which it specifically stated that it had not completed its analysis on the deemed recovery rule proposal of September 10 and was not ready to act upon it.*[18] Thus, the decision that the court of appeals thought it could perceive on December 5 did not exist. To put it mildly, this underscores the wisdom of this Court's requirement in *Motor Vehicle* that an agency provide an explicit statement explaining what it has done and that the reviewing courts not supply one where the agency has not. Nonetheless, the court of appeals' holding, as we have shown, provides a road map for avoiding the *Motor Vehicle* decision and should be reviewed for that reason.[19]

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[18] The agency said in part on December 24:

> The September 10 Notice proposed to eliminate the equal application [*i.e.*, deemed recovery] requirement, except to the extent that it is necessary to protect the independent sector of the market. *The FEA has not completed its analysis of the September 10 proposal as to the pricing of covered products* [*i.e.*, products refined from crude oil] *in general, but it has concluded that a revision to its regulations in this regard for propane prices* [the limited subject of the December 24 rulemaking] *is appropriate at this time*, in light of the special considerations which affect the prices of this product.

39 Fed. Reg. 44407, 44410 (December 24, 1974; emphasis added). As far as we are aware, the agency never acted on the deemed recovery rule portion of the September 10, 1974, proposal. It certainly never *said* that it was doing so.

[19] Two related points should be made. First, the agency did not argue to the court of appeals that it had made the decision to promulgate the rule on December 5; the court of appeals came up with that perception *sua sponte*. The December 24 Federal Register announcement was specifically called to the court of appeals' attention on petition for rehearing. The court of appeals denied the petition without comment. Pet. App. E (112a).

Second, the court seems to have drawn some comfort from the fact that this challenge did not reach it until eight years after promulgation. Pet. App. A (38a). However, Murphy, as the defendant in this lawsuit, had no control over when it was sued and, because it believed that it never violated the equal application rule, could hardly have sued DOE earlier. It would be quite unfair to deprive Murphy of a defense because of delays beyond its control.

III. THIS CASE PRESENTS ISSUES OF GENERAL IMPORTANCE NOT LIMITED TO ENERGY REGULATION.

The Temporary Emergency Court of Appeals was created by Congress to provide fast and uniform decisions of issues arising under the Economic Stabilization Act, 12 U.S.C. § 1904 *note*, and the Emergency Petroleum Allocation Act, 15 U.S.C. § 751, *et seq. Bray* v. *United States*, 423 U.S. 73 (1975). The government has frequently opposed *certiorari* to this Court on the ground, among others, that decisions of TECA do not create general precedent and have little effect outside of that court. *E.g., Energy Resources Group, Inc.* v. *Hodel*, No. 82-628, Brief for the Federal Respondents in Opposition at 7. Moreover, TECA has been told by the government that this Court has a "longstanding practice" of denying review of TECA's decisions.[20]

The present case, as we have seen, concerns the Administrative Procedure Act, a statute of great importance applicable to most federal agencies. TECA has made holdings of broad significance that will affect all agencies subject to that statute. Indeed, the government has, on behalf of other agencies, urged other courts to follow TECA's decisions interpreting the APA. *See, e.g., Buschmann* v. *Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982); *National Nutritional Foods Assocation* v. *Kennedy*, 572 F.2d 377, 384 (2d Cir. 1978). It will no doubt do the same with the decision in the present case, which greatly and unnecessarily expands the ground for avoiding notice and comment in informal rulemaking and evades the force of this Court's holding in *Motor Vehicle Manufacturers' Association*.

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[20] Department of Energy v. The Honorable Clarence A. Brimmer, TECA Nos. 10-40 and 10-41, Opposition to Motion for Stay of Mandate, served March 29, 1982.

CONCLUSION

For the foregoing reasons, we urge this Court to review the decision of the Temporary Emergency Court of Appeals.

Respectfully submitted,

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Dated: March 12, 1984

APPENDIX A

**TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES**

No. 2-40

MOBIL OIL CORPORATION, EXXON CORPORATION,
GULF OIL CORPORATION, and MARATHON OIL CORPORATION,
Plaintiffs-Appellees,

v.

THE DEPARTMENT OF ENERGY and JAMES B. EDWARDS,
Defendants-Appellants.

and

No. 6-31

NAPH-SOL REFINING COMPANY,
Plaintiff-Appellant,

v.

MURPHY OIL CORPORATION,
Defendant-Appellee.

Appeals From The U.S. District Court For The Northern District Of New York And The U.S. District Court For The Western District Of Michigan

(No. 79-CV-11 and No. G79-14-CA6, respectively)

(Argued: April 15, 1983 Decided: December 20, 1983)

DAVID A. ENGELS, Department of Energy, Washington, D.C., with whom Thomas C. Newkirk, Larry P. Ellsworth, Floyd I. Robinson, Thomas A. Schweitzer and Dennis M. Moore of the same agency, were on the brief for the Appellants in No. 2-40.

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Neva T. Campbell, Schwabe, Williamson, Wyatt, Moore & Roberts, Portland, Oregon, on the brief for *Amici Curiae* Richard W. Dyke, dba Western Stations Co., Colvin Oil Company and F. O. Fletcher, Inc., dba Fletcher Oil Company; Steven Schaars and Joan Goldfrank, Collier, Shannon, Rill & Scott, Washington, D.C., on the brief for *Amici Curiae* Go-Tane Service Stations, Inc., Kickapoo Oil Company, Inc. and Lake Shore Oil Company; James F. Flug and Mark Hessel, Lobel, Novins & Lamont, Washington, D.C. on the brief for *Amici Curiae* Attorneys General of Michigan, Alabama, Illinois and Pennsylvania, and the Controller of California; and Charles W. Petty, Jr., Anthony J. Thompson, Charles E. Sliter, Robert F. Reklaitis and Janet E. Pitterle, Hamel, Park, McCabe & Saunders, Washington, D.C. on the brief for *Amicus Curiae* Growmark, Inc., in No. 2-40.

WILLIAM H. BODE, Spriggs, Bode & Hollingsworth, Washington, D.C., with whom John E. Varnum and Tobey B. Marzouk of the same firm, were on the brief for the Appellant in No. 6-31.

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Thomas C. Newkirk, Larry P. Ellsworth, David A. Engels, Floyd I. Robinson, Thomas A. Schweitzer and Dennis M. Moore, Department of Energy, Washington, D.C., on the brief for *Amicus Curiae* The United States Department of Energy in No. 6-31.

Before METZNER, PECK and LACEY, Judges.
LACEY, Judge.

INTRODUCTION

The Department of Energy ("DOE") and Naph-Sol Refining Co. ("Naph-Sol") appeal from orders entered by, respectively, the District Court for the Northern District of New York and the District Court for the Western District of Michigan that, *inter alia*, invalidated the "deemed recovery rule" as procedurally defective. *Mobil Oil Corp.* v. *DOE*, 547 F. Supp. 1246 (N.D.N.Y. 1982),[1] is a declaratory judgment action brought to challenge the validity of a "three cent" retail price equalization rule and, alternativly, of the "deemed recovery rule." *Naph-Sol Refining Co.* v. *Murphy Oil Corp.*, 550 F. Supp. 297 (W.D. Mich. 1982), is an action for recovery of overcharges with respect to Naph-Sol's purchase of gasoline from Murphy Oil Corporation ("Murphy") at prices allegedly in excess of those permitted by the petroleum price regulations, 10 C.F.R. pt. 212, including the "deemed recovery rule," and by the supply contracts existing between the parties. Al-

[1] Plaintiffs in *Mobil* v. *DOE* are Mobil Oil Corporation, Gulf Oil Corporation, Exxon Corporation, and Marathon Petroleum Corporation. Unless otherwise indicated, a reference to Mobil encompasses all these parties.

though, as will become apparent, other issues are also before this court, the invalidation of the "deemed recovery rule" was pivotal to both district court rulings and resulted in the consolidation of these appeals.

I. BACKGROUND

A. Regulatory Background

We first survey the various regulations involved, deferring until a subsequent section any detailed presentation of the procedural aspects of the rulemakings here in issue.

1. Petroleum Price Regulations

Prior to the rulemakings involved here, the Mandatory Petroleum Price Regulations.[2] 10 C.F.R. pt. 212, established limitations on the maximum prices refiners could charge in the

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[2] In November 1973, Congress passed the Emergency Petroleum Allocation Act ("EPAA"). Pub. L. No. 93-159, 87 Stat. 6280, 15 U.S.C. §§ 751 *et seq.* Pursuant to the statute, the President established the Federal Energy Office ("FEO") and delegated to it the authority to implement the allocation and price stabilization provisions of the EPAA. Exec. Order No. 11748, 38 Fed. Reg. 33575 (Dec. 6, 1973). The FEO adopted and republished without significant alternation the Cost of Living Council's Phase IV petroleum price regulations. 39 Fed. Reg. 744, 761 (Jan. 2, 1974); 39 Fed. Reg. 1924 (Jan. 15, 1974). These were the regulations in existence prior to the adoption of the rules involved in these cases.

On May 7, 1974, the Federal Energy Administration Act ("FEAA") was enacted. Pub. L. No. 93-275, 88 Stat. 97, 15 U.S.C. §§ 761 *et seq.* In June 1974, the President abolished the FEO and replaced it with the Federal Energy Administration ("FEA"). Exec. Order No. 11790, 39 Fed. Reg. 23185 (June 27, 1974). The FEA was a predecessor to the Department of Energy ("DOE"), which was established in 1977, pursuant to the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 567, 42 U.S.C. §§ 7101 *et seq.* Federal control of the price and allocation of petroleum products was discontinued on January 28, 1981. Exec. Order 12287, 46 Fed. Reg. 9909 (Jan. 30, 1981).

In text, regulations are cited to the first edition of C.F.R. in which they appear. Between 1973 and 1981 some of the regulations underwent amendments not relevant to the challenges in this case.

sale of "covered products" or of "special products," such as motor gasoline.[3] Under the "price rule," a refiner could "not charge to any class of purchaser a price in excess of the base price" of the covered product except under certain specified conditions. 10 C.F.R. § 212.82 (1975). A "class of purchaser" was defined as "purchasers . . . to whom a person has charged a comparable price for comparable property or services pursuant to customary price differentials between those purchasers . . . and other purchasers. . . ." 10 C.F.R. § 212.31 (1975). One purpose of these price rules was to maintain the supplier-purchaser relationships as they existed in 1972-73, prior to the statutory regulation of the petroleum industry.

The "base price" was "the weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973, plus increased product costs incurred between the month of measurement and the month of May 1973. . . ." 10 C.F.R. § 212.82(f) (1) (i) (1975). To calculate its base price for a given month, therefore, a refiner had to: 1) establish its classes of purchaser; 2) compute its increased product costs and apportion these among the various products it sold; and 3) allocate the increased costs for each product among its classes of purchasers of that product.

The "refiner cost allocation formula" governed apportionment of increased product costs.[4] As it operated in January 1974, this formula yielded a cents per gallon figure, referred to as "d_{iu}," that represented the maximum amount of increased product cost that a refiner might apportion to a given special product:

d_{iu} = the dollar increase that may be applied in the period "u" (the current month) to the May 15, 1973, selling price

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[3] "Special products," with which we are concerned, included no. 2 heating oil and 2-D diesel fuel as well as motor gasoline. 10 C.F.R. § 212.31 (1975).

[4] We consider the rules for "special products." The details of the rules for non-special products are not pertinent here.

A verbal formulation of the "refiner cost allocation formula" is set out in note 5 *infra*.

> of the special product . . . to each class of purchaser to compute the base price to each class of purchaser. . . .

10 C.F.R. § 212.83(c)(2) (1975).

The d_{ju} calculation established the maximum increment of increased product costs a refiner could pass through to each class of purchaser of a particular special product. Since d_{ju} was a single number, the result of the formula was the equal application of increased product costs among classes of purchasers when the maximum was passed through. This rule was designed to distribute the burden of increased costs as uniformly as feasible.

The Regulations, however, did not require refiners actually to charge the base price. In certain market conditions, refiners might choose to set prices below base price by not immediately passing on some of the increased product costs. Whether, as of January 15, 1974, refiners were obligated to pass through increased product costs equally to each class of purchaser when selling prices were below base price is a matter in issue.

As noted, the Regulations did not require a refiner to recover all of its increased product costs for a given month in that month. The "cost bank rule," 10 C.F.R. § 212.83(e)(1) (1975), allowed the refiner to carry over, or "bank," its unrecovered increased product costs for inclusion in the calculation of base prices in a later month:

> (e) Carryover of costs. (1) If in any month . . . a firm charges prices for a special product which result in the recoupment of less total revenues than the entire amount of increased product costs calculated for that product pursuant to the general formula . . . the amount of increased products costs not recouped may be added to the May 15,

1973 selling prices to compute the base prices for that special product for a subsequent month.

Whenever a refiner added previously unrecouped costs to its current price, of course, it had to reduce its "bank" of these costs.[5]

In addition, the refiner could add to the base price certain increases in *non*-product costs incurred since May 1973 but only if the refiner satisfied certain profit margin limitations and complied with a prenotification procedure that required advance notice of the proposed price increase to the agency for its approval. 10 C.F.R. § 212.87 (1975). The sum of the base price and allowable nonproduct cost increases was the refiner's maximum lawful price.

2. April 1974 Three-Cent Rule[6]

The "retail price equalization," or "three-cent," rule, promulgated in April 1974, was a response to an unintended price disparity that had developed between independent and

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[5] This carried over unrecouped cost was part of the calculation in figuring the numerator in the formula for d_{pu}. In verbal form, the d_{pu} formula was as follows:

$$\text{total cost of crude in period } d_{pu} = \text{"u"} \times \frac{\text{total volume of gasoline sold in 3 month period including period "u" of previous year}}{\text{total volume of covered products sold in that period}} + \text{total increased costs of increased purchased gasoline in period "u"} + \text{banked increased costs attributable to gasoline} = \text{product costs allocable to gasoline that a refiner had allocated to other products}$$

the volume of gasoline that the refiner estimates that it will sell in the current month "u"

See 10 C.F.R. § 212.83 (c) (2) (i) (1975).

[6] This rule, the "old" three cent rule, and the May 1977 three cent rule, the "new" three cent rule, are relevant to *Mobil* v. *DOE*, but play no part in the *Naph-Sol* v. *Murphy Oil* appeal.

refiner-operated gasoline stations. *See* 39 Fed. Reg. 12013, 13013-14 (April 2, 1974). In January and February 1974, the FEO authorized independent and refiner-operated retailers of motor gasoline to increase their retail selling prices by up to three cents a gallon to reflect increases in nonproduct costs incurred in the marketing of gasoline. *See* 39 Fed. Reg. 809 (Jan. 3, 1974); 39 Fed. Reg. 7795 (Feb. 28, 1974). Since refiner-operated stations were subject to profit margin and prenotification restrictions, however, they generally did not attempt to recover the three cent marketing cost allowance. As a result, independents were faced with either foregoing the three cent allowance or being undersold by the refiner-operated stations.

FEO responded by promulgating an amendment to the refiner cost allocation formula for calculating d_{ju}:

> d_{ju} = The dollar increase that may be applied in the period "u" (the current month) to the May 15, 1973 selling price of [a special product] to each class of purchaser to compute the base price to each class of purchaser, except that the dollar increase that may be applied in the period "u" to the May 15, 1973 selling price of gasoline to compute the base prices to the classes of purchaser which purchase gasoline at retail from a refiner at service stations operated by employees of the refiner may be "d_{ju}" plus a maximum of $.03 per gallon of gasoline provided that, in computing "d_{ju}," the numerator of the [general formula] is reduced by an amount equal to the product of the actual amount of cents per gallon increase added to "d_{ju}" above multiplied by the estimated number of gallons of gasoline to be sold during the period "u" at retail through service stations operated by employees of the refiner.

10 C.F.R. § 212.83(c)(2) (1975), 39 Fed. Reg. 12013 (April 2, 1974).

The three cent rule thus allowed refiners to pass through an additional three cents per gallon of increased product costs in sales of motor gasoline at refiner-operated stations. The rule, however, did not increase the total amount of increased product costs a refiner could recover. The refiner had to subtract the dollar amount recovered under the three cent rule from the

amount of increased product costs otherwise available for recovery under d_{pu}.[7]

3. Deemed Recovery Rule

In September 1974, without prior notice or opportunity for comment, and in reliance on the "good cause" exception to this procedural requirement, *see* 5 U.S.C. § 553 (b)(B), the FEA promulgated an amendment to the cost bank rule. 39 Fed. REg. 32306 (Sept. 5, 1974). The amendment, addressing a supposed "ambiguity" in the Regulations and directed to preserving "customary price differentials," *id.* at 32307, made explicit that the requirement that refiners pass through increased product costs equally among classes of purchaser applied to actual, and not just maximum, selling prices. It also provided for a "deemed recovery" penalty should actual prices not reflect equal application of costs:

> § 212.83. Allocation of refiner's increased costs.
>
> (e) *Carryover of costs.*
>
> (1) . . . With respect to each special product . . . when a firm calculates the amount of increased product costs not recouped, which may be added to the May 15, 1973 selling prices to compute the base prices for that special product in a subsequent month, it shall calculate its revenues as though the greatest amount of increased product costs actually added to any May 15, 1973 selling price of that special product and included in the price charged to any class of purchaser, had been added, in the same amount, to the May 15, 1973 selling price of that special product and included in the price charged to each class of purchaser; except that, where an equal amount of increased product cost is not included in the price charged to a purchaser because of a price term of a written contract covering the sale of such product which was entered into on or before

[7] Thus, "the cents per gallon increase added to the retail price for gasoline multiplied by the estimated number of gallons to be sold in the period 'u'," was a separately computed term, to be subtracted from the numerator of the d_{pu} formula set forth in note 5 *supra*.

> September 1, 1974, that portion of the increased product costs not included in the price charged to such a purchaser need not be included in the calculation of revenues.

10 C.F.R. § 212.83(e)(1) (1975).

Under the deemed recovery rule, then, the refiner had to pass through increased product costs uniformly among all classes of purchaser or suffer a cost recovery penalty. Specifically, each month the refiner was required to compute its bank of unrecovered costs as though it had charged *all* classes of purchaser the largest increment of increased costs it charged to any one class of purchaser, even though, in fact, it did not. If a refiner applied increased costs unequally, thus, it had to reduce its bank of previously unrecouped costs by an amount that was larger than the amount of increased costs actually recouped. The refiner, that is, was "deemed" to have recovered costs it, in fact, did not. By penalizing selective price increases, therefore, the deemed recovery rule provided an economic incentive for equal pass through of increased product costs in actual selling prices.

In the September 5, 1974 rulemaking, the FEA stated that it intended to hold public hearings regarding propoesd revisions to the Regulations and that, at that time, it would receive comments on the deemed recovery amendment. 39 Fed. Reg. at 32307. On September 10, 1974, the FEA published a notice of a proposed "comprehensive revision" of the Regulations. 39 Fed. Reg. 32718 (Sept. 10, 1974). The proposed revisions included certain modifications of the rules governing equal application of increased product costs and the recoupment of unrecovered increased product costs. *Id.* at 32718-24. The FEA received oral and written comments on the proposed revisions. On December 5, 1974, the FEA repromulgated the deemed recovery rule in its September 5, 1974 form. 39 Fed. Reg. 42368, 42372 (Dec. 5, 1974).

4. May 1977 Three Cent Rule

On January 27, 1977, the FEA published various amendments affecting the pricing of gasoline. One change modified

the definition of d_{ju}, altering it from a cents per gallon figure to a total dollar figure of increased product costs that a refiner could allocate to a given product. 42 Fed. Reg. 5030, 5031 (Jan. 27, 1977). This new definition did not contain the three cent retail price equalization rule that had been introduced into the definition of d_{ju} in April 1974.

On May 5, 1977, without prior notice or opportunity for comment, and in reliance on the interpretative rule exemption to this procedural requirement, *see* 5 U.S.C. § 553 (b)(A), the FEA published a "corrective amendment" to the price rule to replace the "inadvertently omitted" three cent rule:

> § 212.83 Price Rule . . .
>
> (h) *Equal Application among classes of purchaser* . . .
>
> (2) *Special Rules* . . .
>
> (iv) Retail sales of gasoline by refiners. When a refiner calculates the amount of increased costs not recouped that may be added to May 15, 1973, selling prices of gasoline to compute maximum allowable prices in a subsequent month, it may, notwithstanding the general rule in paragraph (b)(1) of this section, compute revenues as though (A) the greatest amount of increased costs actually added to any May 15, 1973, selling price of gasoline and included in the price charged to any class of purchaser that purchases gasoline at retail from a refiner at any service station operated by employees of the refiner had been added to the May 15, 1973, selling price of gasoline and included in the price charged to any class of purchaser that purchases gasoline at retail from a refiner at any service station operated by employees of the refiner had been added, in the same amount (less any actual differential or three cents per gallon, whichever is less) to the May 15, 1973 selling prices of gasoline and included in the price charged to all other classes of purchaser.

10 C.F.R. § 212.83(h)(2)(iv) (1978), 42 Fed. Reg. 22881 (May 5, 1977).

The FEA indicated that this new three cent rule was merely making explicit the equal application requirement, and

deemed recovery penalty, that was implicit in the original three cent rule. *Id.*[8]

In March 1978, Mobil filed a request for a formal interpretation of the three cent rule. The FEA ruled that, since its inception in April 1974, the three cent rule was but a "limited" exception to the equal application requirement. Although it permitted unequal recovery of increased product costs as between retail classes of purchaser of motor gasoline as a group and all other classes of purchaser of gasoline, it did "not authorize any price variations between individual refiner owned stations without penalty." *Mobil Oil Corp.*, Interp. no. 78-53, 43 Fed. Reg. 40207 (Feb. 11, 1978), 6 En. Mgmt. [CCH] ¶ 56444 (1978). *See Atlantic Richfield Co.*, Interp. 78-36, 43 Fed. Reg. 29541 (June 9, 1978), 6 En. Mgmt. [CCH] ¶ 56,427 (1978).

In the FEA's view, therefore, whenever, under the three cent rule, a refiner passed through $.03 of increased product costs to any one refiner-operated gasoline station, it would be deemed to have passed through the full $.03 to all refiner-operated stations even though, in fact, it did not.[9]

B. Proceedings in the District Courts

In January 1979, Mobil brought an action challenging the validity of the new three cent rule and, alternatively, of the September 1974 deemed recovery rule. Mobil's position was that by reading an equal application requirement and deemed

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[8] In this regard, it is notable that the original three cent rule was located in the section setting forth the refiner cost allocation formula (d_{iu}), 10 C.F.R. § 212.83(c) (1975), while the new three cent rule was placed into the then-existing equal application provisions in the Regulations, 10 C.F.R. § 212.83(h) (1978).

[9] In this view, the deemed recovery rule would apply to the last term in the numerator of the d_{iu} formula, the three cent rule term, *see* notes 5 & 7 *supra*, such that refiners would be subject to a cost recovery penalty if they passed through the three cent cost allowance unequally among refiner-operated gas stations.

recovery penalty into the three cent rule, at least among individual refiner operated stations, the new three cent rule did not merely interpret the Regulations but substantively changed them. Accordingly, since the FEA did not follow notice and comment procedures in promulgating it, the new three cent rule was procedurally defective.

Mobil maintained that, under the rule as promulgated in April 1974, there was no requirement that recovery of the three cent allowance be uniform among classes of purchaser or among refiner operated gasoline stations. Mobil further argued that the September 4, 1974 deemed recovery rule applied only to the d_{ju} increment and not to recovery of the three cent allowance. Should the district court have been inclined to a different view of the effect of the September deemed recovery rule on the three cent rule, Mobil, in the alternative, argued that the deemed recovery rule itself was procedurally invalid.

In the district court, the DOE pressed the position that the September deemed recovery rule by its terms applied to *all* increased product costs passed through in actual selling prices, including the three cent allowance. Thus, whether the three cent rule contained an equal application requirement and imposed a deemed recovery penalty in April 1974 *vel non*, it did so in September 1974. The 1977 rule, therefore, was merely an interpretive elaboration of the existing regulatory scheme. The DOE additionally maintained that the deemed recovery rule was validly promulgated in September 1974 under the "good cause" exception, and, further, validly repromulgated in December 1974.

The district court agreed with Mobil that, as promulgated in April 1974, the three cent rule "contained no equal application requirement pertaining to the pass-through of increased product costs. . . ." *Mobil* v. *Doe*, *supra*, 547 F.Supp. 1246, 1270, See *id.* at 1266. The district court, however, never ruled on the impact of the September 1974 deemed recovery rule on the

April 1974 three cent rule. Rather, the court invalidated the deemed recovery rule as procedurally defective.

The court found there was no emergency in September 1974 justifying the FEA's bypass of the notice and comment procedures. *Id.* at 1268-69.[10] The court also rejected the argument that the deemed recovery rule was validly repromulgated in December 1974, finding that the September 10, 1974 notice of proposed rulemaking was inadequate to inform interested parties that the agency was evaluating the deemed recovery rule *de novo. Id.* at 1269.

Since there was no equal application requirement inherent in the April 1974 three cent rule and the September 1974 deemed recovery rule was procedurally invalid and, thus, a nullity, the May 1977 three cent rule effected a substantive change in the Regulations. Since the FEA promulgated this rule without following notice and comment procedures, it, too, was procedurally invalid. For these reasons, the district court entered summary judgment in favor of Mobil.

In January 1979, Naph-Sol brought an action to recover price overcharges allegedly incurred in its purchase of refined petroleum product from Murphy Oil Corp. Naph-Sol's claim that Murphy's prices were in excess of the maximum allowed under the Petroleum Price Regulations was, principally, two fold.[11]

First, Naph-Sol alleged that the price that Murphy charged on May 15, 1973 was in excess of that permitted by the parties' supply contract and, therefore, that Murphy used an unlawful May 15 price in calculating its maximum allowable price under the Regulations.

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[10] We will consider the procedural arguments in detail in Part IV *infra*.

[11] Naph-Sol's complaint also contained other allegations of regulatory and contractual violations. These other counts are not relevant to the present appeal.

Second, Naph-Sol contended that Murphy computed its selling prices in violation of the equal application and deemed recovery requirements. Thus, Naph-Sol claimed that Murphy passed through increased product costs unequally and then computed its cost bank without regard to the deemed recovery principle. Murphy thereby calculated its prices to purchasers as though banked, unrecouped cost increases were available to be passed through when, under the deemed recovery rule, they were not. This resulted in overcharges to purchasers, of whom Naph-Sol was one.

On September 17, 1982, the district court granted summary judgment in favor of Murphy on the unlawful May 15 selling price claim and, on October 1, 1982, it granted summary judgment to Murphy on the deemed recovery rule violation claim. The district court ruled, as a matter of law, that the price Murphy charged Naph-Sol on May 15, 1973 was permissible under the supply contracts between the parties. There was, therefore, no contractual violation and, consequently, no regulatory violation. *Naph-Sol* v. *Murphy Oil Corp.*, *supra*, 550 F. Supp. at 305-06.

The court also invalidated the deemed recovery rule on procedural grounds. The court found that no emergency existed in September 1974. *Id.* at 322-23. Additionally, the court held that the deemed recovery rule was not validly repromulgated since the December 5, 1974 publication did not incluide an adequate statement of the basis and purpose for retaining the rule. *Id.* at 323-24. This ruling effectively disposed of Naph-Sol's claim that it was entitled to recover for overcharges due to Murphy's violation of the deemed recovery rule.

II. STANDARD OF REVIEW

The judicial review provisions of § 211(d) (1) of the Economic Stabilization Act, 12 U.S.C. § 1904 note, which were incorporated into the Emergency Petroleum Allocation Act by 15 U.S.C. § 754(a)(1), limit the scope of our review to a determination of whether regulations were issued in excess of agency authority, are arbitrary or capricious, or otherwise not

in accordance with law under the criteria set forth in 5 U.S.C § 706(2).[12] The relevant provisions of 5 U.S.C. § 706(2) are:

> The reviewing court shall—
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .
>
> * * * * * *
>
> (B) without observance of procedure required by law. . . .

The Supreme court, drawing on its earlier decisions in *Bowman Transportation Inc.* v. *Arkansas-Best Freight System,* 419 U.S. 281 (1974), and *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402 (1971), has recently summarized the appropriate scope of review under the arbitrary and capricious standard:

> The scope of review . . . is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'

Motor Vehicle Manufacturer's Ass'n v. *State Farm Mutual Insurance Co.,* 102 S.Ct. 2856, 2866-67 (1983) (citation omitted). A reviewing court, thus, may not set aside an agency rule that is the product of reasoned decisionmaking, based on consideration of relevant factors, and within the scope of the authority delegated to the agency by statute. *See id.* at 2866, 2871. This court has followed the "rational basis" test. *See*

[12] The "substantial evidence" test mentioned in § 211(d)(1) of the ESA, 12 U.S.C. § 1904 note, expressly applies only to agency orders and not, as is the case here, to the issuance of regulations by means of informal rulemaking. *See* McCulloch Gas Processing Corp. v. DOE, 650 F.2d 1216, 1221 n.7 (Temp. Emer. Ct. App. [hereinafter TECA] 1981).

McCulloch Gas Processing Corp. v. *DOE*, 650 F.2d 1216, 1221 (TECA 1981) (citing cases).

An agency's procedural compliance with statutory norms, however, is subject to closer scrutiny. The reviewing court, having competence in this arena, must satisfy itself that there was procedural integrity in the promulgation of the regulations in question. *See ITT World Communications* v. *FCC*, 699 F.2d 1219, 1246 (D.C. Cir. 1983); *National [sic] Resources Defense Council* v. *SEC*, 606 F.2d 1031, 1048 (D.C. Cir. 1979); *Weyerhaeuser Co.* v. *Costle*, 590 F.2d 1011, 1027 (D.C. Cir. 1978). Nevertheless, although a court may exercise greater independent judgment when reviewing agency action on procedural, rather than substantive grounds,. *see id.*, to the extent that the requisite procedures involve factual determinations, deference is still afforded to agency judgments. *See Philadelphia Citizens in Action* v. *Schweiker*, 669 F.2d 877, 886 (3d Cir. 1982) ("good cause" determination); *Coalition of Michigan Nursing Homes, Inc.* v. *Dempsey*, 537 F. Supp. 451, 458 (E.D. Mich. 1982) (same). The ultimate question remains whether or not the agency's action was arbitrary and capricious, that is, unreasonable. *See ITT* v. *FCC*, *supra*, 699 F.2d at 1246; *Philadelphia Citizens* v. *Schweiker*, *supra*, 669 F.2d at 886; *NRDC* v. *SEC*, *supra*, 606 F.2d at 1050.

Since we review the agency's actions on the identical basis as did the district courts, our review need accord no particular deference to the district courts' conclusions as to whether the administrative record does or does not support the administrative determination as reasonably based. *See Louisiana Environmental Society* v. *Dole*, 707 F.2d 116, 118 (5th Cir. 1983); *Committee for An Independent P-I* v. *The Hearst Corp.*, 704 F.2d 467, 472 (9th Cir. 1983); *Brown* v. *United States Dep't of the Interior*, 679 F.2d 747, 748-49 (8th Cir. 1982); *Philadelphia Citizens* v. *Schweiker*, *supra*, 669 F.2d at 886 n.10. We are free to make an independent determination of the legal quetion as to whether the agency has made a showing of good cause. *See Brown & Williamson Tobacco Corp.* v. *FTC*, 710 F.2d 1165, 1171 (6th Cir. 1983); *Washington State Farm Bureau* v. *Mar-*

shall, 625 F.2d 296, 306 (9th Cir. 1980). *See also Reeves* v. *Simon*, 507 F.2d 455, 458-59 (TECA 1974), *cert. denied*, 420 U.S. 991 (1975).

III. LACHES

Initially, however, we must address DOE and Naph-Sol's contention that these 1979 challenges to the procedural validity of the 1974 deemed recovery rule are barred by laches. The district court in *Mobil* v. *DOE* considered and rejected the argument:

> Inasmuch as the focus of this action is upon the May 5, 1977 three cent rule, and in view of the relatively brief period of time between the issuance of the rule and the commencement of this action . . . this Court is not inclined to dismiss this action on the ground of laches.

547 F. Supp. at 1265. Although we recognize that laches is an equitable defense addressed to the sound discretion of he trial judge, *see e.g.*, *Moore* v. *Smith*, 694 F.2d 115, 119 (6th Cir. 1982), *cert. denied*, 103 S.Ct. 1442 (1983); *University of Pittsburgh* v. *Champion Products*, 686 F.2d 1040, 1045 (3d Cir.), *cert. denied*, 103 S.Ct. 571 (1982); *Dickey* v. *Aloca Steamship Co.*, 641 F.2d 81, 82 (2d Cir. 1981), we cannot uphold the *Mobil* court's laches ruling.

By asking the district court to declare the 1974 deemed rcovery rule invalid on procedural grounds, Mobil shifted the "focus" of this action. This is no less true because Mobil's challenge to the validity of the 1974 rule remains embedded within its challenge to the validity of the 1977 rule. The "focus" might reasonably be said to be the 1977 rule if this action involved merely the proper interpretatin of the 1974 rule. Mobil, however, moved the case considerably beyond this.[13]

[13] Although the DOE did draw attention to the deemed recovery rule, it was Mobil, both in its complaint, *see* Stip. Record pp. 000021-22, and in its motion for summary judgment, *see id.* pp. 000235-310, that put the question of the validity, as opposed to the interpretation, of this rule into issue. Absent this, the district court would not have ruled on the validity of the deemed recovery rule.

Moreover, there is no logical stopping place to the district court's "focus" analysis. New rules typically build on existing ones and an action to declare a current rule invalid could always be cast, in the alternative, as a challenge to the longstanding rule on which the new rule is premised. Under the district court's reasoning, since the "focus" would be on the new rule, laches could never bar the challenge to the old rule, no matter how untimely, or how prejudicial to the defendant. This argument ignores the basic equitable precepts that laches reflects and, as well, would seriously undermine administrative stability. It cannot be sustained.

Mobil, however, also urges that laches is not available in a "defensive" declaratory judgment action like that here. Mobil argues as follows. Statutes of limitations, and laches, do not run against defenses. Mobil therefore would be able to assert the procedural invalidity of the deemed recovery rule in an enforcement action brought by the DOE. Although nominally the "plaintiff" in the pre-enforcement declaratory judgment action now before the court, Mobil must be viewed in the context of its being the defendant in an neforcement action. Since DOE cannot raise laches in an enforcement action, it should not be permitted to raise laches in a declaratory judgment action seeking only to establish the validity of a defense to the anticipated enforcement action.

It is true that laches, and statutes of limitations, do not run against a defense. *See, e.g.*, 118 East 60th *Owners* v. *Bonner Properties*, 677 F.2d 200, 203 (2d Cir. 1982); *Northern Pacific Ry. Co.* v. *United States*, 277 F.2d 615, 623-24 (10th Cir. 1960); these doctrines are available " 'only as a shield. not as a sword.' " *Id.* at 623-24 (citations omitted). There is little authority, however, on the question whether a declaratory judgment plaintiff like Mobil can, for these purposes, be assimilated to the status of a defendant; what there is suggests that it may not.

Thus, in *Abbott Laboratories* v. *Gardner*, 387 U.S. 126 (1967), which held that a pre-enforcement action for declarato-

ry relief could be entertained by the courts if ripeness and exhaustion requirements were met, the Supreme Court stated:

> Further, the declaratory judgment and injunctive remedies are equitable in nature, and other equitable defenses may be interposed. . . . The defense of laches could be asserted if the Government is prejudiced by a delay.

Id. at 155 (citations omitted). One district court, in part relying on *Abbott*, has held that a pre-enforcement declaratory judgment action challenging the validity of the deemed recovery rule was properly characterized as "affirmative" in nature:

> [P]laintiff has had a claim for relief ripe from the institution of the regulations. That claim when it became ripe was not defensive in nature, but affirmative. . . . Without regard to the institution of administrative enforcement proceedings, plaintiff has had an equitable claim for relief since 1974. The interposition of the administrative proceedings does not alter the affirmative nature of this claim.

United Refining Co. v. *DOE*, Civ. No. 79-144, slip op. at 4-5 (W.D.Pa. 1983). Laches therefore was available to the DOE.[14]

We find it particularly difficult to view Mobil's challenge to the deemed recovery rule as "defensive." Mobil, presumably, anticipates being a defendant in an action to enforce the 1977 three cent rule and, thus, aims preemptively to establish the nonenforceability of that rule. Mobil's declaratory judgment action, however, goes considerably further: it challenges the validity of a rule other than the one whose enforcement is,

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[14] In an earlier ruling, relied on by Mobil here, the district court had speculated that laches might not be available. *See* United Refining Co. v. DOE, 4 Energy Mgmt. (CCH) ¶ 26,264 (W.D.Pa. 1980). Upon further reflection, however, the court held to the contrary.

The other case relied on by Mobil, Luckenbach Steamship Co. v. United States, 312 F.2d 545 (2d Cir. 1963), involved a statute of limitations, not laches, and in any event, plainly sought only a simple declaration of non-liability for payments allegedly due.

ostensibly, impending. Although the 1974 deemed recovery rule might somehow be related to the 1977 rule, in these circumstances it would be stretching concepts far too thin to characterize Mobil's challenge to the deemed recovery rule as defensive, or to consider Mobil only "nominally" a plaintiff.

Accordingly, since it is clear that laches can be invoked against a declaratory judgment plaintiff who affirmatively challenges an agency rule, *see, e.g., Citizens and Landowners Against the Miles City/New Underwood Powerline* v. *Secretary of DOE*, 683 F.2d 1171, 1175 (8th Cir. 1982); *Independent Bankers Assoc.* v. *Heimann*, 627 F.2d 486, 487 (D.C. Cir. 1980); *Michigan* v. *City of Allen Park*, 501 F. Supp. 1007, 1016-18 (E.D.Mich. 1980) (counterclaim); *cf. Energy Cooperative Inc.* v. *DOE*, 659 F.2d 146 (TECA 1981) (exhaustion of remedies), we find that laches is available to the DOE.

Laches reflects the principle that "equity aids the vigilant, not those who slumber on their rights." *Gull Airborne Instruments* v. *Weinberger*, 694 F.2d 838, 843 (D.C. Cir. 1982), quoting 2 J. Pomeroy, *Equity Jurisprudence* § 418 (5th ed. 1941). Two elements are essential to a laches defense: 1) inexcusable delay in instituting suit; and 2) prejudice to the defendant from such delay. *See, e.g., Gulf Airborne, supra,* 694 F.2d at 843; *University of Pittsburgh* v. *Champion Products, supra,* 696 F.2d at 1044.

Many of DOE's arguments with respect to delay and prejudice, on their face, are impressive. First, and most significantly, is the obvious fact that Mobil's procedural challenge is brought some five years after the fact of promulgation. Mobil and other oil companies promptly challenged other regulations issued at essentially the same time as the deemed recovery rule and there has been no satisfactory explanation of why, in this case, there was a delay. This is particularly significant here since the judicial review provision in § 211 of the Economic Stabilization Act, 12 U.S.C. § 1904 note, was expressly designed to ensure prompt review of agency action. *See* S.Rep. No. 92-507, 92nd Cong., 1st Sess., *reprinted in* 1971 U.S. Code Cong. & Ad. News 2283, 2292-93.

The apparent effects of the delay are considerable. DOE would now be unable to cure any procedural informity [sic] by repromulgating the deemed recovery rule. It is arguable that invalidation at this juncture would run afoul of congressional intent with respect to petroleum pricing in the period of controls. There is some evidence that Congress never explicitly enacted equal application legislation because, in part, the deemed recovery rule existed. *See* S.Rep. No. 94-26, 94th Cong., 1st Sess. 37-38 (1975). Moreover, invalidation could be seen as prejudicing those refiners who had set their prices in accordance with the rule. Finally, the lost time and expense of DOE's ongoing enforcement actions is to be considered.[15]

Nevertheless, we cannot decide the merits of the laches defense on the present record. All else being equal, we would be inclined to remand the case for factual findings on the question of delay and prejudice. In view of the *Naph-Sol* v. *Murphy* appeal, however, we would not thereby be relieved of the responsibility of deciding the merits of the procedural validity of the deemed recovery rule.

Murphy raised its challenge to the validity of the deemed recovery rule as a defense to Naph-Sol's claim that it was overcharged due to Murphy's violation of the rule.[16] Although we recognize that this suit, unlike an ordinary contract action, implicates a regulatory scheme and not simply the rights of the parties, we believe that Murphy's challenge falls within the rule that laches does not run against a defense. Naph-Sol cannot both seek to recover payments and bar Murphy from defending by challenging the statutory basis upon which the

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[15] Interestingly, in a separate action, Mobil invoked and apparently defended the deemed recovery rule to avoid liability under a New York statute. *See* Mobil Oil Corp. v. Tully, 499 F. Supp. 888, 904-07 (N.D.N.Y. 1980), *aff'd*, 653 F.2d 497 (TECA 1981), 639 F.2d 912 (2d Cir. 1981), *vacated and remanded on other grounds*, 455 U.S. 245 (1982).

[16] On appeal, Naph-Sol urges that Murphy's challenge is barred by laches, relying on essentially the same arguments with respect to delay and prejudice as does the DOE.

claim for recovery is based. Murphy's procedural challenge, thus, cannot be barred by laches; the *Naph-Sol* appeal, therefore, cannot be decided on laches grounds. In view of this, and given our view of the deemed recovery rule issue, we proceed to decide both cases on the merits.

IV. VALIDITY OF THE DEEMED RECOVERY RULE

Before considering the validity of the deemed recovery rule, the subject matter of this section, one further issue, relevant to the *Mobil* v. *DOE* appeal, must be addressed. DOE's 1978 Interpretations of the three cent rule seemingly found that an equal application requirement, with a deemed recovery component, was inherent in the original April 1974 rule. If this were true, the May 1977 three cent rule could be upheld as an interpretive rule whether or not the September 1974 deemed recovery rule was valid. The district court, interpreting the language of the original three cent rule, and relying on this court's decision in *Standard Oil Co.* v. *DOE*, 596 F.2d 1029, 1040-45 (TECA 1978), held that the April 1974 three cent rule did not, of its own force, require that the three cent cost allowance be equally applied. In reaching this result, the court gave little weight to the agency interpretations to the contrary. 547 F. Supp. at 1266-67.

The DOE apparently has abandoned the position that an equal application requirement was implicit in the original three cent rule. Its brief on appeal makes no mention of the argument and, indeed, its summary judgment brief in the district court renounces it. *See* Stip. Record p. 000777. In view of this, and based on our reading of the regulations as of April 1974, we find it unnecessary to expand on the district court's analysis of this issue, which we adopt. Accordingly, the May 1977 three cent rule cannot be upheld as an interpretive rule without a consideration of the impact of the deemed recovery rule on it. We therefore finally turn to the question of the procedural validity of the deemed recovery rule.

A. September 5, 1974 Rulemaking: Good Cause Exception

The notice and comment procedures of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 *et seq.*, and the Federal Energy Administration Act (FEAA), 15 U.S.C. §§ 761 *et seq.*, applied to FEA's September 5, 1974 promulgation of the

deemed recovery rule. The FEA did not observe these requirements, relying on the "good cause" exceptions in each act.

Under the APA, an agency may promulgate a rule without prior notice and comment

> when the agency for good cause finds (and incorporates the finding in a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary or contrary to the public interest.

5 U.S.C. § 553(b)(B). Under the stricter FEAA requirements, notice and comment

> may be waived where strict compliance is found to cause serious harm or injury to the public health, safety, or welfare, and such finding is set out in detail in such rule, regulation, or order.

15 U.S.C. § 766(i) (1) (B).

Notice and comment procedures afford interested parties a meaningful opportunity to participate in the rulemaking process and assure that an agency's decisions will be informed and responsive. *See, e.g., McCulloch Gas Processing Corp.* v. *DOE, supra,* 650 F.2d at 1221; *Mobil Oil Corp.* v. *DOE,* 610 F.2d 796, 802 (TECA 1979), *cert. denied,* 446 U.S. 937 (1980); *State of New Jersey* v. *EPA,* 626 F.2d 1038, 1045 (D.C. Cir. 1980). Accordingly, exceptions to § 553 will be "narrowly construed and only reluctantly countenanced." *Id.; accord* S.Rep. No. 742, 79th Cong., 1st Sess. 16 (1945); *Kollett* v. *Harris,* 619 F.2d 134, 145 (1st Cir. 1980); *Sharon Steel Corp.* v. *EPA,* 597 F.2d 377, 379-80 (3d Cir. 1979); *National Nutritional Foods Ass'n* v. *Kennedy,* 572 F.2d 377, 384-85 (2d Cir. 1978). Courts will closely examine the agency's proffered rationale, *see National Federation of Fedral Employees* v. *Devine,* 671 F.2d 607, 610 (D.C. Cir. 1982) (per curiam); *Mobil Oil Corp.* v. *DOE, supra,* 610 F.2d at 804, but may uphold a finding of good cause justified by obvious and compelling facts that can be judicially noticed. *See National Helium Corp.* v. *FEA,* 569 F.2d 1137, 1141-46 (TECA 1977); *Nader* v. *Sawhill,* 514 F.2d 1064, 1068 (TECA 1974). The waiver provision of the FEAA is similarly

to be used sparingly. *See* Sen. Conf. Rep. No. 93-788, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 2939, 2977. Despite the narrowness of the exceptions, we are persuaded that FEA had "good cause" for promulgating the deemed recovery rule without prior notice and opportunity for comment.

The preamble to the deemed recovery rule explained that the amendment was intended to clarify an "ambiguity" in the Regulations by putting

> all sellers . . . expressly on notice that prices actually charged, and not merely prices calculated as a lawful maximum, must reflect the equal application of increased product costs, except where a pre-existing contract prevents the implementation of such a price.

39 Fed. Reg. 32306, 32307 (Sept. 5, 1974). Although "most sellers" had been equally applying costs in prices below base prices,

> (a)s an improved supply situation has begun to have a restraining influence on prices, the FEA has become aware that certain sellers have taken the position that they may selectively 'bank' increased product costs as to certain classes of purchaser, for recoupment in a subsequent month, as long as the prices charged to other classes of purchaser do not exceed the maximum lawful price.

Id. Such practices "could obviously serve to avoid the intent of the overall framework of the price regulations," particularly the goal of preserving the "customary price differentials" among classes of purchaser. *See id.* The deemed recovery rule was designed to prevent this.

The FEA promulgated the rule without prior notice and comment, finding that an emergency existed and explaining that:

> [A]s the supply situation becomes more favorable, the incentive to depart from the equal application requirement becomes stronger. Moreover, announcement of these amendments as proposals would highlight current

> ambiguities in the regulations and could result in sellers seeking to take advantage of that ambiguity or of the contract exception to the regulation.
>
> The FEA has determined that the continuation or initiation of such practices would be injurious to the public welfare, in view of the number of circumventions of FEA regulations and the substantial compliance difficulties which would result.

According to appellants, then, the FEA feared that highlighting the gap in the Regulations through advance notice would promote discriminatory pricing against independent distributors and, as well, against certain regions of the country, particularly the Northeast. By passing through proportionately greater costs to independent outlets, for instance, refiners could threaten the competitive viability of the independents. Moreover, there was a risk that refiners would seek to take advantage of the "contract exception"[17] to the deemed recovery rule and "grandfather in" unequal cost pass-throughs to refiner operated stations by entering into long-term contracts. Thus, advance notice would result in severe market dislocations and erosion of the class of purchaser scheme so central to the Price Regulations, therby justifying waiver of notice and comment procedures.

Both district courts rejected this argument, finding that the circumstances did not warrant dispensing with notice and comment procedures:

> Here, there was no compelling circumstances surrounding the discriminatory pricing practices cited by the agency. No users had been totally deprived of a supply of motor gasoline, no violence had surfaced or appeared imminent, and, more importantly, no sudden, disruptive change appears to have occurred with respect to either the dis-

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[17] This exception permitted unequal application of increased product costs when existing contracts required refiners to sell product to customers at a price below that the refiner was charging to other classes of purchaser.

> tribution or pricing of motor gasoline on or about the time the September 5, 1974 rule had issued.

Mobil v. *DOE*, *supra*, 547 F.Supp. at 1269; *accord NaphSol* v. *Murphy Oil*, *supra*, 550 F.Supp. at 323.[18] We disagree, both as a matter of law and fact.

"Good cause" is most typically found when circumstances pre-existing the rulemaking call for immediate agency response and waiver is required to accomplish the necessary speed. *See generally* K. Davis, *Administrative Law Treatise* § 6.29 (Supp. 1982).[19] Although it is not free from doubt, both district courts here appeared to find that, as a matter of law, this is the only sort of exigency that would justify by-passing the notice and comment procedure. On a number of occasions, however, this court has held that, in special circumstances, good cause can exist when the very announcement of a proposed rule itself can be expected to precipitate activity by affected parties that would harm the public welfare. *See Nader* v. *Sawhill*, *supra*, 514 F.2d at 1068; *DeRieux* v. *Five Smiths, Inc.*, 499 F.2d 1321, 1332 (TECA), *cert. denied*, 419 U.S. 895 (1974); *see also Reeves* v. *Simon*, *supra*, 507 F.2d at 458-59.

We recognize that agencies might frequently assert that someone will take advantage of the situation if advance notice is given. If the exception is not to become an all purpose

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[18] "In the present case, there were no compelling circumstances surrounding the discriminatory pricing practices. . . . In September of 1974, there was no apparent disruption of petroleum supplies or distribution which created an immediate threat to the public." 550 F. Supp. at 323.

[19] A mere desire to provide guidance and information, or to clarify regulations, however, does not suffice for good cause. *Mobil* v. *DOE*, *supra*, 610 F.2d at 803. To the extent that the FEA justified the need for regulations on the basis of "clarifying ambiguities" alone, it would not amount to good cause. However, we understand the principal justification to be the harm attendant upon announcement of the proposed rule itself: refiners "taking advantage" of the situation. Moreover, FEA sought to do more than simply clarify ambiguities: "It sought to remedy shortcoming in its regulations which had become serious only as a result of sudden changes in market conditions." Shimek v. DOE, 685 F.2d 1372, 1375 (TECA 1981).

escape-clause, therefore, the anticipated response must involve a significant threat of serious damage to important public interests. The circumstances in the present case perhaps were less "calamitous," *see Nader* v. *Sawhill, supra*, 514 F.2d at 1068, than where announcement of a future price increase would exacerbate existing oil supply shortages, *see id.*, or announcement of a future price freeze would generate a "massive rush to raise prices." *DeRieux* v. *Five Smiths, supra*, 499 F.2d at 1332. Nevertheless, in view of the emergency conditions prompting the petroleum price legislation, *see Pasco* v. *FEA*, 525 F.2d 1391, 1394 (TECA 1975), and assuming that announcement of the deemed recovery rule would cause price discrimination and other market dislocations and dampen competition, we find that the threat to the public would be sufficently dire for good cause to be found.

The question thus becomes whether, as a matter of fact, FEA's finding of good cause is supported by the administrative record. It appears that the district courts were skeptical, and appellees here urge that there is no showing that in fact independents would be injured during the notice and comment period. In considering this question it is essential to recognize that we are being called upon, some eight years after the fact, to review agency determinations that were, in large measure, of a judgmental or predictive nature. Whether, in the economic circumstances of late summer 1974, independents and geographic regions were particularly vulnerable to price discrimination and, more importantly, whether refiners were likely to engage in discriminatory pricing if informed of the impending rule change, are not strictly factual questions; they involve subjective judgments.

Judgments of a predictive nature "necessarily involve deductions based on expert knowledge of the Agency"; complete factual support in the record "is not possible or required." *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1978); *accord NAACP* v. *FCC*, 682 F.2d 993, 1001 (D.C. Cir. 1982); *NRDC* v. *SEC, supra*, 606 F.2d at 1052' *see also Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Ins.*

Co., *supra*, 103 S.Ct. at 2871-72. Since forecasts are not susceptible of strict factual proof, they are, in the context of substantive agency decision making, entitled to special deference. The court must simply satisfy itself that the agency explains the facts and policy concerns it relies on, and that, given these, a reasonable person could have made the judgment the agency did. *See NAACP* v. *FCC*, *supra*, 682 F.2d at 1001; *NRDC* v. *SEC*, *supra*, 606 F.2d at 1052. Admittedly, as our discussion in part II suggests, this extreme deference might be inappropriate in reviewing compliance with procedural requirements. Nevertheless, our examination of FEA's proffered good cause rationale must reflect the predictive element in the agency's determination and the agency's special expertise over such questions. *See genrally* K. Davis, *Administrative Law Treatise* § 29.00-1 (Supp. 1982).

Although September 1974 was a period of increasing oil supply, it was still a volatile time, not that far removed from the Arab oil embargo of fall 1973, and far distant from the relative stability in the oil market of 1979 or 1983. Given the changed market conditions in late summer 1974, the relatively recent awareness that this was encouraging selective cost banking, and the policy of preserving the class of purchaser scheme, we are unable to say that the FEA's judgment that notice would lead to price discrimination and pressure on independents and regions was unreasonable. It is easy, in retrospect, to state that FEA's fears were exaggerated. FEA, however, was in a better position in August 1974 to appreciate the economic dynamics of the oil industry at that time than the courts are today; we must avoid being hampered by 20/20 hindsight. Certainly, just as "the announcement of a price increase at a future date *could* have resulted in producers withholding crude oil from the market," *Nader* v. *Sawhill*, *supra*, 514 F.2s at 1068 (emphasis added), and advance notice of a price freeze led to a "massive rush to raise prices," *DeRieux* v. *Five Smiths*, *supra*, 499 F.2d at 1332, announcement of the deemed recovery rule could have generated selective pricing and "grandfathering" of unequal prices in favor of refiner-operated stations. We are not in a position to second-

guess this judgment, or the determination that this would have contributed significantly to eroding the class of purchaser scheme and undermining competitive forces.

Moreover, no one claimed otherwise in September of 1974. None of the oil companies, who were not reluctant to challenge regulations, rejected the FEA's good cause argument by attacking the procedural falidity of the deemed recovery rule in 1974 or 1975. This gives some credence to the FEA's predictive judgment and finding of good cause. So, too, do the numerous comments independents submitted to the FEA in response to the FEA's concern that independents and regions were susceptible to discriminatory pricing.[20] For these reasons, we conclude that the record supports FEA's good cause finding.

Appellees also argue that the September 5 preamble did not adequately recite the reasons for FEA's finding of good cause.[21] In particular, they contend that the FEA's supposed concern with price discrimination and solicitude for independents and geographic regions is simply a post-hoc rationalization advanced by appellants in these actions. We disagree.

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[20] These comments include those by: Independent Gasoline marketers Council, app. at 01007; Independent Terminal Operators Association, app. at 01012; Powerine Oil Co., app. at 00322; Independent Fuel Terminal Operators Association, app. at 00811; Oil Heat Institute of Westchester, app. at 00800; New England Fuel Institute, app. at 00837.

[21] Appellees other arguments need be addressed only briefly. The harm that could have resulted from discriminatory pricing was clearly to the general public and not simply, as appellees maintain, to one segment of the petroleum industry.

The contention that FEA could have solved the problem by publishing a notice of proposed rulemaking that indicated that the rule would be effective as of the date of the notice proves too much since it would swallow the good cause exception as we have interpreted it in *Nader* v. *Sawhill*, *supra*, and *DeRieux* v. *Five Smiths*, *supra*. Moreover, the suggestion that we impose a new procedural requirement is contrary to Vermont Yankee Nuclear Power Co. v. NRDC, 435 U.S. 519 (1978).

In the September 5 preamble, the FEA indicated that some sellers were "selectively bank[ing] increased product costs as to certain classes of purchaser," while charging others the "maximum lawful price," 39 Fed. Reg. 32306, 32307 (Sept. 5, 1974), that the "improved supply situation" provided an "incentive" for sellers to engage in such practices, *id.*, and that announcement of the proposed amendment would prompt sellers "to take advantage of the situation." *Id.* We find this a sufficiently clear expression of concern with price discrimination. The September 5 preamble, it is true, did not specifically mention independents and regions of the country. The preamble, however, stated that a notice of hearings on proposed revisions of the Regulations would appear "in the near future." *id.*, which turned out to be September 10, 1974. The September 10 notice did explicitly indicate that the deemed recovery rule served to protect independents, and regions, from selective pricing. See 39 Fed. Reg. 32718, 2722-23 (Sept. 10, 1974). The September 10 notice was a contemporaneous statement of the agency's views, and not within the "made for litigation" rationalization proscribed by *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947).[22]

For the foregoing reasons we conclude that the FEA was justified in using emergency rulemaking procedures to promulgate the deemed recovery rule under the APA, and under § 7(i)(1)(B) of the FEAA, 15 U.S.C. § 766(i)(1)(B), as well. *See Shimek* v. *DOE*, 685 F.2d 1372, 1374-75 (TECA 1981); *Dorchester Gas Producing Co.* v. *DOE*, Civil No. CA-3-75-0836, slip op. at 18 (N.D. Texas June 24, 1983). Accordingly, we hold that the deemed recovery rule was validly promulgated on

[22] Moreover, even if the good cause statement were inadequate, we would be disinclined to invalidate the rule when we had found that, in fact, good cause existed, *see* Texaco Inc. v. FEA, 531 F.2d 1071, 1082 (TECA), *cert. denied*, 426 U.S. 941 (1976); *DeRieux*, *supra*, 499 F.2d at 1333, all the more so since the rulemaking here in issue preceded this court's admonition that "repeated technical noncompliance [with the APA] will not be tolerated." *Nader* v. *Sawhill*, *supra*, 514 F.2d at 1069.

September 5, 1974. The decisions of the district courts on this issue were erroneous.

B. December 5, 1974 Rulemaking

Even had the September 5, 1974 promulgation been procedurally defective, the infirmity would have been cured by the rulemaking commencing on September 10, 1974 and concluding on December 5, 1974. Both district courts held that the deemed recovery rule was not validly repromulgated, the *Mobil* court finding that the September 10 notice was inadequate and the *Naph-Sol* court holding that the December 5 publication did not contain an adequate statement of "basis and purpose" with respect to the deemed recovery rule. We disagree.

1. Adequacy Of The September 10, 1974 Notice

The APA requires that notice of a proposed rule be published in the *Federal Register* and include "either the terms or substance of the proposed rule or a description of the subjects and issues involved," 5 U.S.C. § 553(b)(3), and that interested persons be given an opportunity to comment on the rule. *Id.* § 553(c). The stricter FEAA required that notice "shall be given by publication of [the] proposed rule" in the *Federal Register* and that a "minimum of ten days following such publication shall be provided for opportunity for comment." 15 U.S.C. § 766(i)(1)(B).

Notice and the opportunity to comment serve to educate the agency, provide fair treatment to persons affected by the rule, and assist judicial review. *See Small Refinery Lead Phase-Down Task Force* v. *EPA*, 705 F.2d 506, 574 (D.C. Cir. 1983); *Standard Oil Co.* v. *DOE*, *supra*, 596 F.2d at 1057-58; *Shell Oil Co.* v. *FEA*, 574 F.2d 512, 516 (TECA 1978). Notice is sufficient if it " 'fairly apprise[s] the interested parties' of the subjects and issues before the Agency," *American Iron and Steel Institute* v. *EPA*, 568 F.2d 284, 291 (3d Cir. 1977); *accord McCulloch Gas Processing Co.* v. *DOE*, *supra*, 650 F.2d at 1221, and thereby "affords interested persons a reasonable and meaningful opportunity to participate in the rulemaking proc-

ess." *Id.; accord Atlatntic Richfield Co.* v. *Doe*, 655 F.2d 1118, 1126 n.6 (TECA 1981).

In this instance, the basic question is whether the September 10 notice revealed FEA's willingness to reevaluate the deemed recovery rule[23] or, rather, that the agency's mind was closed. *See id.* at 1127 n.7; *Texaco Inc.* v. *FEA*, *supra*, 531 F.2d at 1078-79; *State of Sourth Carolina ex rel. Patrick* v. *Block*, 558 F. Supp. 1004, 1020 (D.S.C. 1983).

The September 10 notice proposed the elimination of the equal application requirements with two exceptions: 1) within a given geographic marketing area the costs passed through to a class of purchaser including independents could not be greater than those passed through to classes of purchaser not including independents; and 2) the unequal pass through of costs as between marketing areas could not exceed 10%. 39 Fed. Reg. 32718, 32727 (Sept. 10, 1974) (proposed 10 C.F.R. § 212.83(c)(1)(iii)). The "cost bank" rule proposed on September 10 deleted the deemed recovery penalty as it had appeared in the September 5 promulgation. *See* 39 Fed. Reg. at 32729 (proposed 10 C.F.R. § 212.83(1)(d)).

The Septembr 10 preamble expressly reserved judgment on placing restriction on the unequal pass through of costs as between regions:

> Comments are specifically requested on *whether this limitation on proposed regional flexibility in pricing is needed* and, if so, whether the proposed 10 percent limitation is appropriate.

Id. at 32723 (emphasis added). The preamble also stated that "to the extent that the current [equal application] requirement serves to protect the independent sector of the market, FEA has concluded that it must be retained." *Id.*

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[23] We use this term as a shorthand to refer to the requirements that costs be applied equally in actual selling prices and that a deemed recovery penalty obtain when they are not.

This last statement reveals that the FEA indeed was committed to protecting independents. Nevertheless, in view of the September 5 preamble's promising an opportunity to comment on the deemed recovery rule; the deletion of the deemed recovery penalty in its September 5 form from the September 10 proposed rule; the elimination of other equal application requirements; and the solication of comments on the limitation on unequal pass throughs among regions, we do not find that the September 10 notice, taken as a whole, establishes that the agency was unprepared to reevaluate the deemed recovery rule.

Moreover, the reaction to the notice shows that interested parties were alerted that the deemed recovery rule was under review. Many of the comments from the large refiners urged repeal of the deemed recovery rule and all equal application requirements, while others proposed extensive revisions.[24] Independents, on the other hand, supported retention of the existing rules.[25] Our reading of these comments convinces us that interested parties did not believe that the FEA's mind was closed on the question of retention of the equal applicaton/deemed recovery rule.

One other factor persuades us that the notice was sufficient to apprise interested parties that the deemed recovery rule was before the agency. Unlike as in [sic] the typical "inadequate notice" situation, the refiners, who presumably opposed the newly promulgated cost bank amendment, here had every incentive to read the September 10 notice of proposed rulemaking expansively, and to take it as an opportunity to comment on the deemed recovery rule and to urge its repeal.

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[24] The commentators included: Mobil Oil Corp., app. at 00227; Marathon Oil Co., app. at 00295; Murphy Oil Corp., app. at 00113; Union Oil Co. of California, app. at 00345; Gulf Oil Corp., app. at 00645; Texaco, Inc., app. at 00888; American Petroleum Refiners Assoc., app. at 01021.

[25] *See* note 20 *supra*.

For these reasons. we find the notice was adequate under the APA and the FEAA.[26]

2. **December 5, 1974 Publication: Statement Of Basis And Purpose**

Effective December 1, 1974, the deemed recovery rule was readopted in its September 5, 1974 form as section 212.83(e) of the Petroleum Price Regulations, 10 C.F.R. pt. 212 (1975); 39 Fed. Reg. 42368 (Dec. 5, 1974). The district court in *Naph-Sol* v. *Murphy* held that this December 5, 1974 repromulgation was invalid since it did not include an adequate statement of the "basis and purpose"[27] for retaining the deemed recovery rule, 550 F.Supp. at 310.

The purpose of a contemporaneous "basis and purpose" statement is to facilitate meaningful judicial review by enabling the court to become aware of the legal and factual background of the agency's action. *Action on Smoking & Health* v. *CAB*, 699 F.2d 1209, 1215-16 (D.C. Cir. 1983); *State of Missouri ex rel. Freeman* v. *Block*, 690 F.2d 139, 143 (8th Cir. 1982); *Baltimore & Ohio Chicago Terminal RR Co.* v. *United States*, 583 F.2d 678, 687 (ed Cir.), *cert. denied*, 440 U.S. 968 (1978). Although an exhaustive listing of findings or a full analysis is not required, it is desirable for the agency to respond in a reasoned manner to the comments received and to explain how the decision was arrived at. *See Action on Smoking* v. *CAB*, *supra*, 699 F.2d at 1216. The statement of basis and purpose need not be published at the exact same moment as the rule. The inquiry must be whether "the rules and statement are published close enough together in time so that there is no doubt that the statement accompanies rather than

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[26] The FEA published notice of the exact terms of the proposed rules in satisfaction of 15 U.S.C. § 766(i)(1)(B)'s requirements.

[27] The APA requires that "[a]fter consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c).

rationalizes the rule." *Tabor* v. *Jt. Board for Enrollment of Actuaries*, 566 F.2d 705, 711 n.14 (D.C. Cir. 1977); *accord Baltimore & Ohio* v. *United States*, *supra*, 583 F.2d at 688.

In the December 5, 1974 preamble, the FEA indicated that it had decided to revise the price regulations on the pass through of *non*-product cost increases by refiners. The preamble continued:

> Action on all other revisions to the price regulations proposed in the September 10 notice is deferred until a later date. However, those possible revisions which have not been acted on continue to be under active consideration by FEA for decision in this proceeding.

39 Fed. Reg. at 42638.

Admittedly, this is hardly a model statement of the reasons for the agency's decision to retain the deemed recovery rule. Nevertheless, even when the basis and purpose statement is cursory, or, indeed, non-existent, a rule may be upheld when the agency's path may reasonably be discerned. *Alabama Ass'n of Insurance Agents* v. *Board of Governors of the Federal Reserve System*, 533 F.2d 224, 237 (5th Cir. 1976), *cert. denied*, 435 U.S. 904 (1978); *Hoving Corp.* v. *FTC*, 290 F.2d 803, 807 (2d Cir. 1961); *United States* v. *Exxon Corp.*, 561 F.Supp. 816, 828 (D.D.C. 1983); *see also DeRieux* v. *Five Smiths*, *supra*, 499 F.2d at 1333. Such is the case here.

The September 5, 1974 preamble promised the opportunity to comment on the newly promulgated deemed recovery rule. 39 Fed. Reg. at 32307. The September 10 preamble canvassed in some detail the opposing policy considerations involved, principally the interest in permitting refiners flexibility in pricing to respond to market conditions as against the concern that regions and independents not suffer unfairly from "selective" flexibility. 39 Fed. Reg. at 32722-23. The comments the FEA received elaborated these competing positions. Despite the abbreviated statement of basis and purpose, then, FEA's reason for retaining the deemed recovery rule is reasonably clear: the agency concluded that the needs of regions and independents outweighed the benefits of price flexibility.

It should be apparent that the sort of truncated basis and purpose statement contained in the December 5 preamble is not recommended: an agency should respond meaningfully to comments and explain its decision. In this case, however, we are disinclined, some eight years after the event, to invalidate a rule on the technical ground of a deficient statement of basis and purpose when we can fairly discern the agency's aims.

Accordingly, we find that the December 5, 1974 promulgation was procedurally valid. The deemed recovery rule, therefore, was validly repromulgated as of December 1, 1974.

In sum, we hold that the deemed recovery rule was validly promulgated on September 5, 1974 and validly repromulgated on December 5, 1974. The decisions of the district courts on this question are reversed. Since the *Mobil* court's ruling that the May 1977 three cent rule was procedurally invalid was premised on the invalidity of the 1974 deemed recovery rule, that ruling is vacated. The case is therefore remanded for consideration of the impact of the September 1974 deemed recovery rule on the April 1974 three cent rule, directed toward determining whether the May 1977 three cent rule was validly promulgated as an interpretive rule.

That portion of *Naph-Sol* v. *Murphy* ruling that Naph-Sol was not entitled to recovery for overcharges due to Murphy's violation of the deemed recovery rule is vacated. The case is remanded for determination of whether, in fact, Murphy violated this rule and overcharged Naph-Sol thereby. Unlike our review of *Mobil* v. *DOE*, our review of *Naph-Sol* v. *Murphy* is not yet complete. We must consider the claim that Murphy's May 15, 1973 selling price was in violation of the contract between the parties and, therefore, of the Price Regulations.

V. PRICE OVERCHARGE: MAY 15, 1973 TRANSACTION PRICE

A. Jurisdiction

Initially, Murphy raises the question of our jurisdiction over Naph-Sol's appeal from the district court's determination that the prices Murphy charged Naph-Sol on May 15, 1983 were permissible under the parties' supply contracts and, therefore, lawful under the Price Regulations.[28]

Section 211(b)(2) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note, granted the Temporary Emergency Court of Appeals "exclusive jurisdiction over all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder." Section 5 of the Emergency Petroleum Allocation Act, 15 U.S.C. § 754(a)(1), incorporated this special grant of jurisdiction. Two principal inquiries guide our determination of TECA jurisdiction: whether resolution of the litigation in its entirety requires the application or interpretation of the EPAA and regulations, *Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp.*, 591 F.2d 711, 716 (TECA), *cert. denied*, 444 U.S. 879 (1979), and whether an EPAA issue has been adjudicated in the district court. *Texaco Inc.* v. *Doe*, 616 F.2d 1193, 1198 (TECA 1979); *Coastal States Marketing Inc.* v. *New England Petroleum Corp.*, 604 F.2d 179, 187 (2d Cir 1979); *see Francis Oil & Gas Inc.* v. *Exxon Corp.*, 687 F.2d 484, 487 (TECA 1982).

Naph-Sol seeks recovery for overcharges pursuant to § 210(b) of the ESA, 12 U.S.C. § 1904 note. Thus allegations in the complaint implicate the EPAA and its implementing

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[28] Under the Regulations, a refiner's base price was "the weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973 plus increased product costs . . ." 10 C.F.R. § 212.82(b)(1) (1975). The maximum allowable price was base price plus allowable nonproduct cost increases. Naph-Sol alleges that it constituted a separate and individual single member class of purchaser.

regulations. Indeed, the claim rests entirely on the Regulations and its resolution involves their application. The interpretation of the terms of the supply contracts between Naph-Sol and Murphy was incident to, and interwoven with, the question whether Murphy's May 15, 1973 selling price was lawful under the Regulations. Although based on its interpretation of the contract, the district court was required to resolve the litigation and held that Murphy had not violated the Price Regulations; therefore, an EPAA issue has been adjudicated and we have jurisdiction over this appeal. *See Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp., supra*, 591 F.2d at 716; *Mountain Fuel Supply Co.* v. *R. Johnson & Johnson Oil Co.*, 586 F.2d 1375, 1384 (10th Cir. 1978).

B. MERITS

The contract prices in each of the two supply agreements between Naph-Sol and Murphy[29] were set by reference to, and fluctuated with, "Platt's Chicago Postings,"[30] but were "subject to . . . minimum and maximum prices" for each product. Stip. Record on Appeal at 89-94. Under the contracts, Naph-Sol was required to purchase a minimum of 7.5 million gallons of motor gasoline at Ferrysburg and 1 million gallons of gasoline at Marquette. The supply agreement also included a "price adjustment" clause, which read as follows:

> Price Adjustment. MURPHY reserves the right at any time during the period of this agreement to increase or decrease the agreement price provided for herein. In the

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[29] The first contract governed purchases by Naph-Sol at Murphy's terminal at Ferrysburg, Michigan; the second governed purchases at Murphy's terminal at Marquette. Wisconsin.

[30] Platt's Chicago Posting is an average of refiners' posted prices at Chicago, Illinois, for a particular refined product, as published in *Platt's Oilgram*, a daily industry newsletter.

In the Ferrysburg contract, Naph-Sol agreed to pay Murphy a price equal to Platt's Chicago Posting minus \$.0025 per gallon, and in the Marquette contract, Platt's Chicago Posting plus \$.0025 per gallon.

> event any such increase or decrease in price is unacceptable to Purchaser, Purchaser shall have the right to cancel the agreement on written notice insofar as the particular product or products involved are concerned, said cancellation to be effective at the time stated in said notice. On the failure of Purchaser to exercise this right of cancellation, the increase or decrease in prices shall become automatically effective.

Id. at 91.

On or shortly before May 15, 1973. Murphy began to charge prices in excess of the maximum stated in the supply agreements.[31] Naph-Sol accepted fuel shipments and paid these higher prices. Naph-Sol, which purchased petroleum from Murphy at least through the filing of its complaint in 1979, alleges that the prices charged by Murphy violated the supply contracts and, therefore, the Price Regulations. Murphy, relying on the price adjustment provision, maintains the prices were valid under the contracts.

The district court granted summary judgment in favor of Murphy. The court found that the contract terms were unambiguous and that the price adjustment provision permitted Murphy to charge Naph-Sol prices in excess of the maximum in the supply agreements. Since Naph-Sol accepted fuel shipments at these prices, under the price adjustment clause the prices automatically became effective. The court rejected Naph-Sol's argument that the price adjustment term was inconsistent with the minimum-maximum provision and that the specific term (the minimum-maximum term) governed over the general term. Under the agreements Naph-Sol was obligated to purchase minimum amounts of gasoline when prices were within the minimum and maximum range. Naph-Sol, however, could be excused from meeting its minimum purchase requirements if Murphy increased its prices in accord-

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[31] These prices were based on Murphy's prevailing terminal wholesale postings ("rack prices").

ance with the price adjustment clause. The two provisions, the court reasoned, are therefore not inconsistent. *Naph-Sol* v. *Murphy Oil, supra,* 550 F. Supp. at 306.

We agree with the district court's construction. The contract terms are unambiguous. In particular, by its plain language the price adjustment clause authorized Murphy to increase its prices beyond those expressly provided for in the contracts.[32] Contrary to Naph-Sol's argument, advanced in the distrct court and renewed on appeal, this provision may reasonably be harmonized with the minimum-maximum clause, as the district court has shown, such that effect many be given to all the terms in the contract.[33]

Accordingly, we hold that Murphy's May 15, 1973 selling price was permissible under the parties' supply agreements

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[32] Naph-Sol's argument that the price adjustment clause meant that Murphy could arbitrarily choose to vary prices within the minimum-maximum range ignores the plain language stating that Murphy could, at any time, "increase or decrease the agreement price provided herein." The agreement price can only be understood as the Platt's Chicago Posting price up to the maximum. Moreover, under Naph-Sol's interpretation, it would have had the right to cancel the contract even when the price Murphy charged was within the contract ceiling. This interpretation is not plausible.

[33] Naph-Sol urges that it would be "ridiculous" for it to have entered a contract that gave Murphy the power unilaterally to raise prices with Naph-Sol's only recourse being to terminate the contract. This being as it may, when the contract is unambiguous, the courts may not write a party a better agreement than it entered.

Naph-Sol frequently refers to the price adjustment clause as mere "boilerplate" in a "form contract" prepared by Murphy as though, somehow, the term therefore did not count. Naph-Sol, however, does not allege that this was a contract of adhesion and, given the status of the parties, there is no suspicion that it was. Further, the contract was only three pages in length, typed, and easily readable. Moreover, on the first page, ¶ 4 specifically stated that "The Provisions of Agreement stated below, except those that by their terms are inapplicable, are part of this agreement." Stip. Record on Appeal 89. The price adjustment clause was found under the "Provisions of Agreement."

and, therefore, that Murphy used a lawful May 15, 1973 transaction price under the price regulations.

VI. CONCLUSION

In conclusion, we rule as follows. In *Mobil* v. *Doe* we hold that: (1) the April 1974 three cent rule did not itself require equal application of the three cent cost allowance: (2) the promulgation of the deemed recovery rule on September 5, 1974 was procedurally valid: and 3) the repromulgation of the deemed recovery rule on December 5, 1974 was procesurally valid. The district court's judgment that the May 5, 1977 three cent rule was procedurally invalid is vacated. The case is remanded for consideration of the impact of the deemed recovery rule on the April 1974 three cent rule and, in this light, of the procedural validity of the May 1977 three cent rule.

Affirmed in part, reversed in part, vacated in part, and remanded for further proceedings consistent with this opinion.

In *Naph-Sol* v. *Murphy Oil* we hold that: 1) Murphy's May 15, 1973 selling price was permissible under the parties' supply contracts and lawful under the price regulations: 2) the promulgation of the deemed recovery rule in September 5, 1974 was procedurally valid; and 3) the repromulgation of the deemed recovery rule on December 5, 1974 was procedurally valid. The case is remanded for determination of whether, in fact, Murphy violated the deemed recovery rule and thereby overcharged Naph-Sol.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES OF AMERICA
DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. G79-14 CA6

NAPH-SOL REFINING COMPANY,

Plaintiff,

v.

MURPHY OIL CORPORATION,

Defendant.

RECEIVED
10-5-82

ORDER

This matter is before the court on defendant's motion for summary judgment on plaintiff's fourth cause of action, and in accordance with the opinion filed this date,

IT IS HEREBY ORDERED that the equal application rule did apply to the establishment of base prices, whether at or below the maximum allowable base price for nonspecial products;

IT IS FURTHER ORDERED that the equal application rule did not apply to special products after September 13, 1973;

IT IS FURTHER ORDERED that the September 5, 1974, promulgation of the deemed recovery rule and all subsequent repromulgation of the deemed recovery rule were procedurally invalid.

IT IS FURTHER ORDERED, therefore, that defendant's motion for summary judgment on the plaintiff's fourth cause of action is granted in part and denied in part.

DOUGLAS W. HILLMAN
Douglas W. Hillman
District Judge

Dated: October 1, 1982.

Certified As A True Copy
Gerald H. Liefer, Clerk
By S. Walker
Deputy Clerk
U.S. District Court
Western Dist. of Michigan
Dated: Oct. 1, 1982

UNITED STATES OF AMERICA
DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. G79-14 CA6

NAPH-SOL REFINING COMPANY,

Plaintiff,

v.

MURPHY OIL CORPORATION,

Defendant.

RECEIVED
10-5-82

OPINION RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S FOURTH CAUSE OF ACTION

Presently before the court is defendant's motion for summary judgment on plaintiff's fourth cause of action. The court held this motion in abeyance when it issued its earlier opinion on defendant's various motions. Following a status conference at which the importance and applicability of the deemed recovery rule were clarified, the court is now prepared to address defendant's motion.

Plaintiff seeks to apply the equal application and deemed recovery rules to Murphy in support of its claims for overcharges in the fourth cause of action. Plaintiff claims that:

> "52. During each month of the period relevant to this complaint, Murphy has applied a lesser proportion of its increased costs to its own employee-operated "Spur" retail outlets than it has applied in determining its selling prices to Naph-Sol.
>
> 53. During each month of the period relevant to this complaint, Murphy has applied a greater proportion of its

> increased costs to the class of purchaser in which Naph-Sol properly belongs than it has applied, on a proportionate basis, to other classes of purchaser."

Based on these allegations, plaintiff claims that defendant miscalculated the amount of "banked" costs available for recoupment in each month and improperly computed the maximum allowable prices for covered products sold to plaintiff. Defendant Murphy Oil has moved for summary judgment arguing that the deemed recovery rule is both procedurally and substantively invalid.

STANDARD FOR SUMMARY JUDGMENT

On a motion for summary judgment, the movant has the burden of showing conclusively that there exists no genuine issue as to material fact and that the moving party is entitled to summary judgment as a matter of law. *Smith* v. *Hudson*, 600 F.2d 60 (6th Cir. 1979); *Tee-Pak, Inc.* v. *St. Regis Paper Co.*, 491 F.2d 1199 (6th Cir. 1974).

In determining whether there are issues of fact requiring a trial, "the inferences to be drawn from the underlying facts contained in [the affidavits, attached exhibits and depositions] must be viewed in the light most favorable to the party opposing the motion." *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962). *Accord, Bohn Aluminum & Brass Corp.* v. *Storm King Corp.*, 303 F.2d 425 (6th Cir. 1962). Even if the basic facts are not disputed, summary judgment may be inappropriate when contradictory inferences may be drawn from them. *Dielbod, supra; EEOC* v. *United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry, Local 189*, 427 F.2d 1091, 1093 (6th Cir. 1970). In making this determination, the court must make reference to the entire record and all well-pleaded allegations are to be accepted as true. *Dayco Corp.* v. *Goodyear Tire & Rubber Co.*, 523 F.2d 389 (6th Cir. 1975). These guidelines will be adhered to as substantive issues of the various motions are examined.

EQUAL APPLICATION

As will be explained more fully below, the deemed recovery rule was adopted as an amendment to the refiner's price rule, 10 C.F.R. § 212.83, on August 30, 1974. 39 Fed. Reg. 32306 (Sept. 5, 1974). Stated simply, the rule required that refiners either pass through equal increments of increased product costs over May 15, 1973, selling prices to all purchasers of a particular product, or charge different increments, but absorb the differences rather than "banking" or carrying over the unrecouped costs. An important preliminary issue, which may affect the procedural validity of the deemed recovery rule, is whether the prior regulations required such "equal application."

The original regulations were adopted by the Cost of Living Council under the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 (note), on August 22, 1973. 6 C.F.R. § 150, Subpart L, 38 Fed. Reg. 22536 (Aug. 22, 1973). These controls placed ceilings on the prices which refiners could charge for covered products. They did not require that the maximum allowable prices be charged, a theme which would carry through the entire regulatory period.

The first suggestion of an equal application requirement appears in the preamble to these original regulations. It states in part:

> "Any increase in base prices . . . of a product due to increased costs of crude petroleum or increased costs of imports must be applied equally to all classes of purchasers of that product."

38 Fed. Reg. 22536, 22537. The regulations describing allocation of increased crude oil costs for special products (gasoline, #2 oils) stated:

> "[A] refiner may, in computing its base prices for [special products] . . . include an amount to reflect increased costs . . . which are attributable to that product. . . . In no case may the ratio that the attributed part bears to the total increased costs . . . exceed the ratio which sales during

> the corresponding fiscal quarter of the preceding year of the particular product receiving this allocation bears to the total sales of covered products during the same quarter."

Sections 150.356(f), 150.357(d). 38 Fed. Reg. at 22540, 22541. For covered products other than special products (also referred to herein as nonspecial products) the rules stated:

> "[A] refiner may, in computing its base prices for [nonspecial products] . . . include an amount to reflect increased costs . . . which are attributable to all of its covered products. To the extent that a refiner does not allocate increased costs . . . pursuant to this paragraph, it may include that part of its increased costs . . . attributable to [special products] in computing its base prices for those products.

Sections 150.356(e), 150.357(c). 38 Fed. Reg. at 22540, 22541.

Both section 150.356 (allocation of increased costs of imported crude oil) and section 150.357 (allocation of increased costs of domestic crude oil) concluded with the requirement that "[t]he amount of increased costs . . . included in computing . . . base prices of a particular product must be equally applied to each class of purchasers of that product."

The basic refiner's price rule stated:

> "A refiner may not charge a price for an item in excess of the base price of that item except [prenotified, nonproduct cost increases]."

Section 150.358(b), 38 Fed. Reg. at 22541.

In its memorandum in support of its motion for summary judgment, defendant argues that the equal application rule applied only to nonspecial products. This completely ignores the early history of the regulations. The original regulations, as quoted above, clearly require equal application for all products.

On September 12, 1973, the regulations were amended and clarified. 38 Fed. Reg. 25686 (Sept. 14, 1973). At that time a formula was introduced which was to be used to calculate the

maximum amount of increased crude oil costs which could be added to the May 15, 1973 selling price of a particular product. Section 150.356(c)(2). The formula yielded a "D" term which was defined as "The dollar increase that can be applied to each May 15, 1973, selling price of the covered product concerned to each class of purchaser to compute . . . the . . . base price to each class of purchaser. 38 Fed. Reg. at 25688. The same formula and the same "D" term applied to both special products and products other than special products. Section 150.356(c)(1) allowed the carryover of unrecouped costs. Section 150.356(e) stated that refiners could increase prices other than a special product to reflect increased crude oil costs, "provided that the amount of increased costs included in computing base prices of a particular covered product other than a special product must be equally applied to each class of purchaser." The explicit equal application requirement no longer included special products.

On October 31, 1973, further amendments were promulgated. 38 Fed. Reg. 30267 (Nov. 2, 1973). These retained the single formula scheme with an express equal application requirement for computing base prices of nonspecial products only. *Compare* § 150.356(c)(i) *with* § 150.356(c)(ii). A new section 150.356(d) was introduced containing banking provisions. This section expressly required equal application of banked costs to each class of purchaser of *nonspecial* products in computing base prices.

For special products the carryover provision stated:

> "If . . . a firm charges prices for a special product . . . which result in the recoupment of less total revenues than the entire amount of increased costs of . . . crude petroleum calculated for that product . . . the amount of increased costs not recouped may be added to the May 15, 1973, selling prices to compute the base prices for that special product . . . for a subsequent month."

Section 150.356(d)(i).

On November 30, 1973, 38 Fed. Reg. 33577 (Dec. 6, 1973), the rules were significantly amended with the introduction of

two general allocation formulas, one for the special products, the other for nonspecial. Section 150.356(c)(2). The general formula for special products established "the dollar increase that may be applied . . . to the May 15, 1973 selling price of the special product . . . of the type 'i' to each class of purchaser to compute the base price to each class of purchaser." This amount is designated in the formula as "d_iu". This formula is almost identical to the former single formula adopted in September, 1973. *Compare* "D" at 38 Fed. Reg. 30270 *with* "d_iu" at 38 Fed. Reg. 33580.

The requirement of equal application in computing base prices for nonspecial products again appeared at section 150.356(c)(1)(ii).

> "In computing base prices for a covered product other than a special product, a refiner may increase its May 15, 1973 selling price to each class of purchaser . . . by an amount to reflect the increased product costs attributable to sales of covered products other than special products . . . provided that the amount of increased product costs included in computing base prices of a particular covered product other than a special product must be equally applied to each class of purchaser."

Similarly, section 150.356(d)(2) required equal application of banked costs when used to compute base prices of nonspecial products. *Cf.* § 150.356(d)(1) (no express equal application requirement when applying banked costs to special products).

On December 27, 1973, the regulations were repromulgated by reference in 10 C.F.R. § 201. 39 Fed. Reg. 744 (Jan. 2, 1974). On January 14, 1974, the regulations were republished in full at 10 C.F.R. § 212. 39 Fed. Reg. 1924 (Jan. 15, 1974). More specifically, 6 C.F.R. § 150.356 became 10 C.F.R. § 212.83. The relevant regulations remained unchanged from those promulgated on October 30, 1973, and quoted above. These were also the regulations as they existed immediately prior to the adoption of the deemed recovery rule.

The regulations clearly required equal application of increased nonproduct costs for both special and nonspecial prod-

ucts. 10 C.F.R. §§ 212.83(c)(2)(i)(b), (ii)(b), 39 Fed. Reg. at 1953. At issue is whether these regulations required equal application of increased product costs even if a refiner chose to sell product at less than the maximum allowable price.

All of the regulations quoted above refer to the equal application rule in terms of computing *base prices*. The August 17, 1973, regulations defined "base price" for a particular product as "the weighted average price at which that item was lawfully priced in transactions on May 15, 1973 . . . plus increased costs of [crude oil] . . ." Section 150.358(g).

Defendant attacks the equal application rule by arguing that it applies only when establishing a "base price" which defendant argues is the single maximum allowable price for a particular product. Therefore, defendant argues there is no equal application requirement if a refiner sells product at prices below the maximum allowed.

Defendant, however, is in the somewhat difficult position of arguing that the "base price" is a single maximum lawful price at which covered products could be sold, (Def's. Mem. in Support of Motion, at page 18) and was also a flexible number whereby "a refiner had discretion to establish a *base price* that included only a portion of [the maximum increment of increased product cost that could be added to the weighted average May 15, 1973, price]." (Emphasis added.) *Id.* at 22.

The distinction is critical. Since all of the regulations addressing equal application address it only in terms of computing a base price, if the base price is a fixed maximum number, then *arguably* (as defendant suggests), the rule applies only at maximum allowable prices. Conversely, if the "base price" is that price which the refiner determines by deciding how much increased costs to allocate to a product, then the rule applies to the process of establishing the "base price" even if the refiner sets a base price less than the maximum allowable amount.

The court notes the apparent difficulty in deciding whether prices below the maximum are "base prices." *See Standard Oil*

Co. v. *DOE*, 596 F.2d 1029, 1040-1045 (TECA, 1978) and defendant's allegations set out above concerning refiners' discretion to establish base prices. In addition, the court notes a recent decision in *Mobil Oil* v. *DOE*, No. 79-CV-11 (N.D. N.Y. Sept. 21, 1982). At page 35 (slip opinion), the district judge states that "the rule refers only to the computation of base prices, not to the computation of actual selling prices below base prices." Two sentences later he states:

> "In this regard, the Temporary Emergency Court of Appeals [TECA] has indicated that under the base price rules, a refiner was not required to add all increased product costs arrived at under the general formula in determining base prices; *that a refiner could vary its base prices* according to the amount of increased product costs applied to May 15, 1973 selling prices; and that the sum represented by adding all increased product costs calculated under the formula to the May 15, 1973 selling price was the maximum base price, *rather than the only base price. See Standard Oil Co.* v. *DOE* [supra]."

In *Standard Oil, supra,* TECA was called on to decide whether the "base price" for special products was a single maximum amount. At issue was a regulation which required that all product cost increases (PCIs) be passed through before non-product cost increases (NPCIs). Since unrecouped NPCIs could not be banked, some refiners were passing through NPCIs first, and banking PCIs which could not be passed through. DOE promulgated the challenged regulation without notice and comment. DOE argued that the base price was a single identifiable number arrived at by adding the "d_iu" term for a given month and product, to the May 15, 1973, selling price, and that NPCIs could only be passed through after the PCIs established by the d_iu term had been figured into the base price. The lower court held that the base price for special products was flexible; that refiners had discretion to use less than the maximum allowable costs in establishing base prices, to which it could then add its NPCIs. 453 F.Supp. 203 (N.D. Ohio, 1978).

On appeal, TECA held the promulgation invalid because "a 'fixed' base price interpretation [of the prior regulations] was

not compelled." 596 F.2d at 1045. The fixed base price interpretation not being compelled, notice and comment were necessary prior to amending the regulations. The argument is even less compelling for nonspecial products, where the D_1u term is significantly more amorphous. After reviewing defendant's analysis and the TECA decision in *Standard Oil*, the court finds that it agrees with defendant's characterization of prices below the maximum allowable price as "base prices." Therefore, the equal application rule applied whenever a refiner determined its base price, whether or not it was the maximum allowable base price.

One final issue concerning the equal application rule; does it apply to special as well as nonspecial products? Defendant contends that the equal application rule applies only to nonspecial products, and is necessary only because the "D_1u" term for nonspecial products simply defines a lump sum dollar amount which may be apportioned to nonspecial products. The court finds this analysis unsupportable since the rule preceded the appearance of the separate "d_1u" term which can be added to each class of purchaser is a single, fixed increment. This is exactly the argument the Northern District of Ohio rejected, but which TECA did not reach, in *Standard Oil* v. *DOE*, *supra*. This court agrees, the base price for special products is not fixed, and therefore does not of itself require equal application.

In determining the applicability of the equal application rule to special products, the court turns to the early history of the regulations. When the original CLC regulations were promulgated in August, 1973, they explicitly required equal application for both special and nonspecial products. Sections 150.356(e), 150.357(c), 38 Fed. Reg. at 22450, 22451. The express equal application requirement was deleted when the regulations were amended on September 12, 1973. Since the "D" term in the formula which was introduced in the September promulgation, does not require equal application (*see* discussion at 453 F.Supp. at 224-226), there is no equal application

requirement. It appears that the equal application requirement for special products was simply deleted.

The court thus finds that the equal application rule applied to special products prior to September 12, 1973, and applied to nonspecial products at least up until September, 1974. Further, the rule applied at maximum prices and in determining base prices below the maximum.

DEEMED RECOVERY RULE

It was against this regulatory background that the deemed recovery rule was promulgated. It was promulgated without notice and an opportunity to comment on August 30, 1974. 39 Fed. Reg. 32306 (Sept. 5, 1974). The agency did not label the promulgation interpretive, but chose instead to waive the notice and comment requirement based on exigent circumstances. The notice of promulgation reflected the agency's interpretation of prior regulations as requiring equal application of increased product costs at less than maximum allowable base price. The statement also noted that changing market conditions had highlighted an ambiguity in the regulations.

> "In general, these regulations have resulted in the equal application of increased product costs among classes of purchaser. An ambiguity in the regulations, however, is that sellers are not specifically required actually to charge the prices arrived at under the regulations. As an improved supply situation has begun to have a restraining influence on prices, the [agency] has become aware that certain sellers have taken the position that they may selectively 'bank' increased product costs as to certain classes of purchaser, for recoupment in a subsequent month, as long as the prices charged to other classes of purchaser do not exceed the maximum lawful price. Such practices could obviously serve to avoid the intent of the overall framework of the price regulations, and the [agency] is undertaking to insure that these pricing practices are not put into effect."

Id. at 32307. The deemed recovery rule was intended

> "to clarify and make explicit the requirement that prices charged for each covered product must reflect the equal

> application of increased product costs to each class of purchaser, and that failure to charge prices that reflect equal application of increased product costs except to the extent the seller is precluded from charging such prices by the price term of a contract . . . will result in unrecouped increased product costs which the seller will not be permitted to recover in a subsequent month. . . ..
>
> At the same time, the FEA has concluded that its regulations should be clarified in this regard, so that all sellers will be expressly on notice that prices actually charged, and not merely prices calculated as a lawful maximum, must reflect the equal application of increased product costs, except where a pre-existing contract prevents the implementation of such a price."

Id.

The amendment itself actually operated on the banking provisions of section 212.83(d), by

> "amending . . . regulations providing for the carryover of unrecouped increased product costs by a seller. Thus, for each product the recoupment of increased product costs will be calculated on the assumption that the largest amount of increased product cost added to the May 15, 1973 selling price and included in the price charged to any class of purchaser, was equally applied to the price charged to all class of purchaser, without regard to whether such prices were, in fact, charged."

Id. The amendment did not affect a refiner's ability to charge less than the maximum allowable base price. It merely limited the ability to *selectively* apply higher increased costs to some purchasers, while banking unrecouped costs not passed through to other purchasers.

The notice of promulgation also discussed the contract exception, which allowed recovery of unrecouped increased products costs which did not reflect equal application, where the seller's recovery was limited by a pre-existing contract. This situation was one aspect of the agency's finding of an emergency.

"The [agency] has concluded that these amendments must be made effective on September 1, 1974, prior to opportunity for comment, upon a finding that an emergency exists. It has only recently come to [the agency's] attention that certain sellers have implemented and continue to implement prices which do not conform to the [agency] concept of preserving May 15, 1973 price differentials among various classes of purchaser. To the extent that there is ambiguity in the current regulations, compliance efforts as to such sellers are more difficult. And, as the supply situation becomes more favorable, the incentive to depart from the equal application requirement becomes stronger. Moreover, announcement of these amendments as proposals would highlight current ambiguities in the regulations and could result in sellers seeking to take advantage of that ambiguity or of the contract exception to the regulation.

The [agency] has determined that the continuation of initiation of such practices would be injurious to the public welfare, in view of the number of circumventions of [agency] regulations and the substantial compliance difficulties which would result."

The notice closed by noting that the agency was preparing further proposed revisions to the price regulations, and that public hearings would be held within the month on those revisions, at which time the agency would take comments on the deemed recovery rule.

In moving for summary judgment on plaintiff's fourth cause of action, defendant Murphy Oil challenges plaintiff's right to recover alleged overcharges on the grounds that the deemed recovery rule was procedurally and substantively invalid. For the reasons that follow, I find that the deemed recovery rule was invalidly promulgated. Therefore, it will be unnecessary to address defendant's substantive challenge to the deemed recovery rule.

ADMINISTRATIVE PROCEDURE

Both the rulemaking provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq.*, and the Federal Energy Administration Act (FEAA), 15 U.S.C. § 761, *et seq.*,

applied to the Federal Energy Administration's (FEA) September 5, 1974, rule promulgation. *See, Mobil Oil Corporation* v. *Department of Energy*, ___ F.Supp. ___, No. 79-CV-11 (N.D. N.Y. filed Sept. 21, 1982); *Lakes Gas Co.* v. *Department of Energy*, 477 F.Supp. 187, 189 (D. Minn. 1979). The APA provides that notice of a proposed rule be published in the Federal Register and that interested persons be given the opportunity to comment on the proposed rule. 5 U.S.C. § 553(c). The APA further requires that a proposed rule be published 30 days before its effective date. 5 U.S.C. § 553(d). The FEAA requires that any proposed rule be published ten days in advance of a rule's effective date to provide interested parties the opportunity to comment on the proposed rule. 15 U.S.C. § 766(i)(B)(c).

Under the APA and the FEAA, notice and comment requirements can be waived under narrow exceptions. *See, New Jersey* v. *Environmental Protection Agency*, 626 F.2d 1038, 1045 (D.C. Cir. 1980); *Shell Oil Co.* v. *Federal Energy Administration*, 574 F.2d 512 (TECA 1978). Under the APA, an agency is permitted to promulgate a regulation without prior notice and opportunity for comment where the agency, for good cause, finds the procedure to be impracticable, unnecessary, or contrary to the public interest, 15 U.S.C. § 553(b)(B). Under the more stringent requirements of the FEAA, notice and comment procedures could be waived only if compliance with formal rulemaking procedures would result in serious harm or injury to the public welfare, 15 U.S.C. § 766(i)(B) redesignated, Department of Energy Organization Act § 709 (1977), 42 U.S.C. § 7191(e).

Notice and comment procedures were applicable to the September 5 rule promulgation. Under the FEAA, notice and comment procedures were required where an agency promulgation was likely to have a substantial impact on the nation's economy or large numbers of individuals or businesses, 15 U.S.C. § 766(i)(1)(C). This requirement applied not only to rules and regulations but also to orders similar to rules or regulations. Conference Report No. 93-788, 93rd Cong. 2d Sess. reprinted in (1974) U.S. Code Cong. & Ad. News 2977.

Although the APA generally exempts agencies from notice and comment procedures when promulgating interpretative rules, 5 U.S.C. § 553(b)(3)(A), agencies are not exempt from notice and comment procedures where notice and comment procedures are required by statute. 5 U.S.C. § 553(b). Thus, since the FEAA statutorily required notice and comment procedures to be followed in promulgating orders that were similar to regulation, the deemed recovery rule was subject to formal rulemaking procedures of the APA and the FEAA regardless of whether or not the deemed recovery rule was an interpretative ruling of a prior regulation or a new rule. *See Lakes Gas Co., supra*, at 190.

Since the deemed recovery rule was subject to notice and comment requirements, the FEA's waiver of formal rulemaking procedures can only be justified by compelling circumstances. *Mobil Oil Corp.* v. *Department of Energy*, 610 F.2d 796 (TECA 1979); *Nader* v. *Sawhill*, 514 F.2d 1064 (TECA 1975). In the present case, FEA waived notice and comment because it stated that compliance with formal rulemaking procedures would be injurious to the public welfare. 39 Fed. Reg. 32307 (Sept. 5, 1974). FEA's assertion that an emergency existed was based on FEA's findings that due to an ambiguity in the regulations, certain sellers had taken the position that they could selectively "bank" increased product costs as to certain classes of purchaser for recoupment in a subsequent month against other classes of purchaser. *Id.*

FEA feared that this practice, which was permitted where a seller was bound by contractual arrangements, *see*, FEA Ruling 1974-12, 39 Fed. Reg. 18423 (May 20, 1974), would become widespread if the agency complied with formal rulemaking procedures. FEA believed that publication of the proposed rule would have alerted sellers to the ambiguity in the regulations and invited sellers to evade the effect of the future rule by entering into long term contracts during the rulemaking period. This practice, allegedly, would have resulted in discriminatory pricing against independents and various geo-

graphic regions. Under these circumstances, FEA believed that an emergency existed which permitted the waiver of formal rulemaking procedures. I disagree.

As noted earlier, exceptions to the notice and comment provisions are to be used "very sparingly," Conf. Report *supra* at 2977. Case law establishes that noncompliance with rulemaking procedures is to be tolerated only in "calamitous circumstances." *Nader* v. *Sawhill, supra*, at 1069. Waiver of notice and comment procedures is only permitted where there is an immediate need for a regulation to avoid severe economic consequences. *Shell Oil Corp.* v. *Federal Energy Administration, supra; Tasty Baking Co.* v. *Cost of Living Council*, 529 F.2d 1005 (TECA 1975); *California* v. *Simon*, 504 F.2d 430 (TECA 1974).

Both *Nader* v. *Sawhill, supra*, and *Shell Oil, supra*, are instructive in determining when notice and comment procedures may be waived. In *Nader*, TECA upheld an immediate price increase of $1 per barrel on "old" crude oil. The increase, which was promulgated without notice and comment was upheld on the grounds that an immediate need for crude oil was needed due to the Arab oil embargo. TECA specifically stated that its holding was limited to the unique circumstances of that case. *Nader, supra* at 1069. In *Shell Oil*, TECA held that notice and comment could not be waived to issue ceiling price regulations on unleaded gasoline despite the fact that the need for unleaded gasoline was immediate and the only alternative was to put unregulated fuel on the market.

In the present case, there were no compelling circumstances surrounding the discriminatory pricing practices cited by the agency, or discernible to this court, to justify waiver of formal rulemaking procedures. In September of 1974, there was no apparent disruption of petroleum supplies or distribution which created an immediate threat to the public. *Cf. Nader, supra* (disruption of supply). Indeed, the agency itself, in its September 5 promulgation, stated that petroleum supplies were increasing. 39 Fed. Reg. 32308. Furthermore, had FEA

complied with notice and comment procedures, sellers would only have had ten days in which to enter long-term contracts to avoid the effects of the deemed recovery rule. 15 U.S.C § 766(i)(1)(B). It is highly unlikely that enough long-term contracts could have been entered into in that brief period which would have created a severe economic impact on the national economy. Such a determination would be highly speculative. Thus, the court concludes that the perceived emergency did not rise to the level of "calamitous circumstances" which would justify the waiver of formal rulemaking procedures. As a result, I find the September 5, 1974, promulgation of the deemed recovery rule to be procedurally invalid. Therefore, plaintiff is not entitled to recover alleged overcharges based on defendant's breach of the deemed recovery rule.

SUBSEQUENT PROCEEDINGS

Plaintiff and DOE both argue that even if the September 5th promulgation was procedurally invalid, any procedural infirmities were cured by the September 6, 1974, notice of proposed rulemaking, 39 Fed. Reg. 321718 (Sept. 10, 1974), the comment period which followed, and subsequent republication of the equal application rule on November 29, 1974. 39 Fed. Reg. 42368 (Dec. 5, 1974). The agency closed its September 5th rulemaking by stating:

> "The FEA will, however, receive public comment on the amendments issued today. The FEA is preparing further proposed revisions to the price regulations. Public hearings respecting the proposed revisions and the amendments issued today are anticipated in September. The FEA will solicit written and oral comments during these proceedings, notice of which will appear in the FEDERAL REGISTER in the near future."

Id. at 32307. The September 10th notice of proposed rulemaking followed. In its notice, the agency discussed several aspects of the rule which were undergoing administrative review, *e.g.*, regional pricing differentials and inflexibility which

was at odds with certain EPAA mandates. The discussion concluded by stating, at page 32723:

> "However, to the extent that the current [equal application] requirement serves to protect the independent sector of the market, FEA has concluded that it must be retained. Accordingly, the FEA proposes to amend the equal application requirement so that different amounts of increased product costs may be added to the prices charged to different classes of purchaser of a product, provided that the amount added to the prices charged to any class of purchaser that includes independent marketers cannot be greater than the amount added to the prices charged to any other class of purchaser of the same product, except to the extent that a refiner is selling to a particular purchaser at a lower price under a pre-existing written contract.
>
> Comments are specifically requested as to whether this provision will adequately protect the independent sector of the market, or whether other restrictions on the application of increased product costs are required and, if so, what they should be."

Numerous other amendments to the regulatory scheme were also proposed in the September 10 notice.

On November 1, 1974, one of the unrelated proposed amendments was adopted. 39 Fed. Reg. 39259 (Nov. 6, 1974). In its notice of promulgation the agency stated, "Action on all other revisions to the price regulations proposed in the September 10 notice is deferred until a later date. However, those possible revisions continue to be under active consideration by [the agency] for decision in this proceeding." *Id.* No mention was made of the equal application or deemed recovery rules.

A second aspect of the September 10th proposal was promulgated on November 29, 1974. 39 Fed. Reg. 42368 (Dec. 5, 1974). This promulgation deleted the pre-notification procedures for nonproduct cost increases, redefined nonproduct costs, and defined refinery fuel as a nonproduct cost. The preamble to the promulgation contained a provision almost identical to the one quoted above from the November 1st

promulgation. No mention was made of the equal application or deemed recovery rules, although they were republished.

The procedural validity of this process is almost identical to the question this court addressed in upholding the validity of the 1976 amendment to the "V" factor in its opinion of September 17, 1982. The two issues are whether the later notice and comment process was sufficient, and whether the later promulgation was an effective promulgation of the challenged rule. The court found the 1976 "V" factor amendment valid because the notice was sufficient to make interested parties aware of the proposed regulation and its ramifications. Although the present situation is very similar, the court finds it unnecessary to address the notice issue since it finds the promulgation itself invalid.

As stated in the court's earlier opinion:

> "[t]his argument is based on . . . the failure to discuss the issue in the 'general statement of . . . basis and purpose,' required by 5 U.S.C. § 533(c) . . . As stated in *Rodway* [v. *United States Department of Agriculture*, 514 F.2d 809, 817 (D.C. Cir. 1975)]:
>
> > 'The basis and purpose statement is *not intended to be an abstract explanation addressed to imaginary complaints*. Rather, *its purpose is*, at least in part, *to respond* in a reasoned manner *to the comments received, to explain* how the agency resolved any significant *problems raised by the comments*, and to show how that resolution led the agency to the ultimate rule.' (Emphasis added.)
>
> . . .
>
> Moreover, agencies need not reply to each comment received.
>
> > '[I]t should be obvious that the Secretary need not answer each of the thousands of comments he received over a two-year period. See *Automotive Parts & Accessories Assn.* v. *Boyd*, 407 P. 330, 338 (D.D. Cir. 1968). Nor does every nonfrivolous 'substantive' inquiry merit a head-on response in the agency's general statement under 5 U.S.C. § 533(c). Instead, the Secretary is obli-

> gated to identify and comment on only major issues raised during the proceeding which are central to his exercise or regulatory discretion. Judgments as to what issues are vital and material also are susceptible to review under the arbitrary and capricious standard. *Home Box Office, Inc.* v. *FCC*. 567 F.2d 9, 35 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).' "

In its earlier opinion, the court found that the challenged issue did not rise to the status of a major issue requiring agency comment in the basis and purpose statement. The present situation is easily distinguished. The administrative record and DOE's analysis in its Amicus Memorandum, clearly demonstrate that the impact of the equal application and deemed recovery rules, especially on the independent segment of the industry, was a major issue in the public comment process. Accordingly, the agency's decision to promulgate the rule (or to repromulgate it without amendment) had to be supported by a statement "explain[ing] how the agency resolved any significant problems raised by the comments," for it to be a procedurally valid promulgation. *Rodway, supra*. The November 1, 1974, promulgation neither mentioned nor published the deemed recovery rule. The November 29, 1974, promulgation republished the rule, but provided no introductory remarks concerning its decision to retain it. Therefore, the rule was not properly promulgated.

Plaintiff suggests that several other republications were sufficient to validly promulgate the rule. The court finds these republications suffering from the same fatal lack of a basis and purpose statement.

Later promulgations did not cure the procedural invalidity of the original promulgation of the deemed recovery rule.

CONCLUSION

In summary the court finds the equal application rule applied to the establishment of base prices, whether at or below the maximum allowable base price for nonspecial products. It did not apply to special products after September 13, 1973.

The promulgation of the deemed recovery rule required full notice and comment procedures. The promulgation was therefore deficient and the rule invalid. Later agency actions did not cure these procedural defects.

DOUGLAS W. HILLMAN
Douglas W. Hillman
District Judge

Dated: October 1, 1982.

Certified As A True Copy
Gerald H. Liefer, Clerk
By S. Walker
Deputy Clerk
U.S. District Court
Western Dist. of Michigan
Dated: Oct. 1, 1982

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

79-CV-11

MOBIL OIL CORPORATION, EXXON CORPORATION, GULF OIL CORPORATION, and MARATHON OIL COMPANY,
Plaintiffs,

vs.

THE DEPARTMENT OF ENERGY, and JAMES B. EDWARDS, Secretary of Energy,
Defendants.

U.S. DISTRICT COURT
N.D. OF N.Y.

FILED
SEP 21 1982

AT ___ O'CLOCK ___ M,
J. R. SCULLY, Clerk
SYRACUSE

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HOWARD G. MUNSON, C. J.

MEMORANDUM-DECISION AND ORDER

The plaintiff oil refiners have instituted this action to obtain declaratory relief in connection with certain provisions of the Mandatory Petroleum Price Regulations, 10 C.F.R. Part 212, that pertained to motor gasoline. Specifically, the plaintiffs have challenged the procedural and substantive validity of a "three cent retail price equalization rule which contained a "deemed recovery component. Alternatively, they have contested the validity of the "equal application" rule, which also contained a deemed recovery component. Jurisdiction is invoked under Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973 [EPAA], 15 U.S.C. § 754(a)(1), Section 211 of the Economic Stabilization Act of 1970 [ESA] 12 U.S.C. § 1904 note, Section 523(b) of the Energy Policy and Conservation Act, 42 U.S.C. § 7192; Section 502(b) of the Department of Energy Organization Act, 42 U.S.C. § 7192(b), the Administrative Procedure Act, 5 U.S.C. § 702, and under 28 U.S.C. §§ 1331, 1337, 1361, 2201, and 2202.

Presently before the Court are the plaintiffs' motion for summary judgment, and the defendants' cross-motion for summary judgment.

I.

In 1971, President Nixon announced his Economic Stabilization Program, which, as embodied in the ESA, was intended to halt the rising tide of inflation, which, at that time, was plaguing the country. A supervisory body of this Program, the Cost of Living Council [CLC], was delegated the authority to issue regulations necessary to the accomplishment of this objective.

Beginning in 1973, the CLC, in an effort to stem the spiraling prices of petroleum products, promulgated a number of rules that imposed mandatory price controls upon refiners. *See* 38 Fed. Reg. 15765 (June 15, 1973); 38 Fed. Reg. 19464 (July 20, 1973); 38 Fed. Reg. 21593 (August 9, 1973); 38 Fed. Reg. 22536 (August 22, 1973); 38 Fed. Reg. 23794 (September 4, 1973); 38 Fed. Reg. 25686 (September 14, 1973); 38 Fed. Reg. 28845

(October 17, 1973); 38 Fed. Reg. 30267 (November 2, 1973); 38 Fed. Reg. 31686 (November 16, 1973); 38 Fed. Reg. 33577 (December 6, 1973). Although these controls placed ceilings upon the maximum prices that refiners could charge for motor gasoline, they did not purport to forbid refiners from setting prices that were less than the regulatory limitations. *See* Fed. Reg. at 15765; 38 Fed. Reg. at 19464.

Congress also sought to limit petroleum prices. In November, 1973, it enacted the EPAA, which directed the President to issue regulations governing the pricing and allocation of crude oil and petroleum products. *See* 15 U.S.C. § 753(a). In Section 4(b)(1) of the original, and amended, EPAA, Congress directed the President to promulgate regulations that would provide for:

> (A) protection of public health (including the production of pharmaceuticals), safety and welfare (including maintenance of residential heating, such as individual homes, apartments and similar occupied dwelling units), and the national defense;
>
> (B) maintenance of all public services (including facilities and services provided by municipally, cooperatively, or investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large);
>
> (C) maintenance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;
>
> (D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;
>
> (E) the allocation of suitable types, grades, and quality of crude oil to refiners in the United States to permit such refineries to operate at full capacity;
>
> (F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among

all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of, exploration for, and production or extraction of—

(i) fuels, and

(ii) minerals essential to the requirements of the United States,

and for required transportation related thereto;

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

15 U.S.C. § 753(b)(1)(A)-(L). In setting forth Section 4(b)(1)(F), 15 U.S.C. § 753(b)(1)(F), Congress was particularly concerned with the problem of price discrimination: "The reference to equitable prices in the bill is specifically intended to emphasize that one of the objectives of the mandatory allocation program is to prevent price gouging or price discrimination which might otherwise occur on the basis of current shortages." H.R. Rep. No. 93-628, 93rd Cong., 1st Sess., *reprinted in* [1973] U.S. Code Cong. & Admin. News at 2702.

Section 4(b)(2) of the EPAA, as originally adopted, specified that the President's regulations should "provide for a dollar-for-dollar passthrough of net increases in the cost of . . . refined petroleum products to all markets or distributors at the retail level." 15 U.S.C. § 753(b)(2)(A). The purpose of this provision is set forth in the legislative history:

> [I]t is contemplated that prices for allocated fuels will be set at levels or pursuant to methods which will permit adequate compensation to assure that private property is not implicitly confiscated by the government. Most importantly, the president must, in exercising his authority, strike an equitable balance between the sometimes conflicting needs of providing adequate inducement for

the production of an adequate supply of product and of holding down spiraling consumer costs.

H.R. Rep. No. 93-628, 93rd Cong., 1st Sess., *reprinted in* [1973] U.S. Code Cong. and Admin. News, at 2703. In 1975, this provision was amended to read: "refined petroleum products at all levels of distribution from the producer through the retail level."

Following the passage of the EPAA, in December, 1973, the President created a predecessor agency of the Department of Energy [DOE], and delegated to this agency his authority under the EPAA. *See* 38 Fed. Reg. 33575 (December 6, 1973). The CLC subsequently delegated its authority under the ESA to this same agency. *See* 39 Fed. Reg. 24 (January 2, 1974).

In January, 1974, the new agency adopted the CLC's price rule and published them as the Mandatory Petroleum Price Regulations. *See* 39 Fed. Reg. 1949 (January 15, 1974). These Regulations laid down guidelines affecting the maximum prices that a refiner could charge for the sale of "covered products", which included crude oil and "special products" such as motor gasoline. *See* 10 C.F.R. § 212.31 39 Fed. Reg. at 1950, 1951.

One critical feature of the Regulations was a "price rule." Set forth in 10 C.F.R. § 212.82(a), this rule provided that "[a] refiner may not charge to any class of purchaser a price in excess of the base price" of motor gasoline except under certain specified circumstances. 39 Fed. Reg. at 1952. In this regard, "class of purchaser" was defined as "purchasers . . . to whom a person has charged a comparable price for comparable property or services pursuant to customary price differentials between these purchasers . . . and other purchasers. . . . "10 C.F.R. § 212.31, 39 Fed. Reg. at 1950.

As used in the price rule, and in other provisions, "base price represented the sum of (1) a refiner's weighted average price at which motor gasoline was lawfully priced in transactions with a particular class of purchaser on May 15, 1973; and (2) a refiner's increased "product" costs, or increases in the costs of

crude oil and purchased products since May, 1973, 10 C.F.R. § 212.83(b), 39 Fed. Reg. at 1954. 10 C.F.R. § 212.82(f); 39 Fed. Reg. at 1953. Increased "product" costs were determined according to a refiner cost allocation formula. This formula yielded a cents-per-gallon figure referred to as "d_{ju}", which denoted the maximum amount of increased "product" costs that a refiner could apportion to a specific product like motor gasoline:

> § 212.83. Allocation of refiner's increased product costs.
>
> * * * * * *
>
> (c) *Allocation of increased-costs—*
>
> * * * * * *
>
> (2) *General formulae:*
>
> * * * * * *
>
> d_{ju} = the dollar increase that may be applied in the period "u" (the current month) to the May 15, 1973 selling price of [a special product] to each class of purchaser to compute the base price to each class of purchaser.

10 C.F.R. § 212.83(c)(2), 39 Fed. Reg. at 1955.

To the "base price" a refiner could add certain increased "non-product" costs, or increases in the costs of refining and transportation of petroleum products that had been incurred since May, 1973. 10 C.F.R. § 212.83(a) & (b), 39 Fed. Reg. at 1952-53. Under the price rule, this new sum, a "price in excess of base price," could not be recovered by a refiner unless the refiner satisfied certain profit margin limitations and complied with a prenotification procedure that required advance notice of the proposed price increase to the agency for its implicit or explicit approval. 10 C.F.R. §§ 212.82(c)(1) & (2)(i), 212.82(i), 39 Fed. Reg. at 1952, 1954. In addition to these restrictions, a refiner could charge for motor gasoline a "price in excess of base price" only if it "equally applied to each class of purchaser" the amount of increased "non-product" costs allocable to that special product. 10 C.F.R. § 212.82(c)(2)(i)(b), 39 Fed. Reg. at 1953.

Another important feature of the Regulations was a "cost bank rule", contained in 10 C.F.R. § 212.83(d)(1), 39 Fed. Reg. at 1956. Because the price rule placed limitations upon the prices that a refiner could charge for special products, such as motor gasoline, occasions arose when a refiner could not recover all its increased "product" costs. The cost bank rule addressed these situations, and permitted a refiner to carry over, or "bank", its unrecovered increased "product" costs for inclusion in the calculation of base prices for motor gasoline in a later month:

> § 212.83. Allocation of refiner's increased product costs.
>
> * * * * * *
>
> (d) *Carryover of costs.* (1) If in any month. . . . a firm charges prices for a special product which result in the recoupment of less total revenues than the entire amount of increased product costs calculated for that product pursuant to the general formula . . ., the amount of increased product costs may be added to the May 15, 1973 selling prices to compute the base prices for that special product for a subsequent month.

Independent retailers operated under a pricing system similar to that scheme imposed upon refiners. In January and February, 1974, however, the agency issued rules permitting independent retailers to increase their retail selling prices for motor gasoline by up to $.03 per gallon in order to reflect "non-product" costs incurred in the marketing of motor gasoline. *See* 39 Fed. Reg. 809 (January 3, 1974); 39 Fed. Reg. 7795 (February 28, 1974). A refiner could take advantage of this allowance for increased "non-product" costs only if it first satisfied the price rule limitations upon the recovery of a "price in excess of base price." Because of these strictures, refiner-operated stations generally chose not to undertake the burden of increasing motor gasoline prices by $.03 per gallon. Independent retailers of motor gasoline then had to decide whether to charge an additional $.03 per gallon above prices charged by refiner-operated stations, and thereby recover their increased

"non-product" costs, or to absorb the \$.03 per gallon allowance by selling at prices competitive with those charged by refiner-operated stations.

On April 2, 1974, the agency responded to a "price disparity" that had developed between independent and refiner-operated stations by publishing an amendment to the general refiner cost allocation formula for determining "d_{iu}", the amount of increased "product" costs:

> § 212.83. Allocation of refiner's increased product costs.
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> * * * * * *
>
> (c) *Allocation of increased-costs.*
>
> * * * * * *
>
> (2) General formulae:
>
> * * * * * *
>
> d_{iu} = The dollar increase that may be applied in the period "u" (the current month) to the May 15, 1973 selling price of [a special product] to each class of purchaser to compute the base price to each class of purchaser, except that the dollar increase that may be applied in the period "u" to the May 15, 1973 selling price of gasoline to compute the base prices to the classes of purchaser which purchase gasoline at retail from a refiner at service stations operated by employees of the refiner may be "d_{iu}" plus a maximum of \$.03 per gallon of gasoline provided that in computing "d_{iu}" the numerator of the [general formula] is reduced by an equal amount to the product of the actual amount to cents per gallon increased added to "d_{iu}" above multiplied by the estimated number of gallons of gasoline to be sold during the period "u" at retail through service stations operated by employees of the refiner. . . .

10 C.F.R. § 212.83(c)(2), 39 Fed. Reg. 12013-14 (April 2, 1974). According to the agency, this refiner "retail price equalization" rule, or "three cent" rule, "permit[ted] a refiner to allocate an additional three cents of its increased product costs" to gaso-

line prices charged at refiner-operated stations, "provided that a corresponding reduction in the amount of increased product costs allocated to the price of gasoline sold through independent dealer-operated stations is made." 39 Fed. Reg. at 12013. The agency noted further that while the amendment did "not change the total amount of increased product costs" which a refiner could pass through, it did "permi[t] an adjustment in the allocation of those costs which should result in an equalization of the price charged for gasoline produced by the refiner at the retail level." *Id.* Finally, the agency explained that because the "purpose" of the amendment was "to provide immediate guidance and information . . . and to permit the amendment to be implemented during the month of April," normal rulemaking procedures would be "impracticable" and "good cause" existed for making the amendment effective in less than thirty days. *Id.*

Subsequently, according to the agency, an "ambiguity" became apparent in the Regulations. 39 Fed. Reg. 32307 (September 5, 1974). The ambiguity, the agency stated, could be best understood by reference to a "funadamental" tenent of the Regulations, namely, the "equal application of increased product costs among classes of purchaser." *Id.* As the agency related:

> The concept of preserving the customary price differentials that existed as of May 15, 1973 among various classes of purchaser of a particular covered product is fundamental to the . . . system of price regulations, and has been expressed in various . . . rules. Under the refiners' price rules, for example, a formula is provided for determining a uniform cents per gallon increment of increased product cost which may be applied to the May 15, 1973 selling price to each class of purchaser, in order to determine the base price for that product to that class of purchaser. The base price is the maximum lawful price for the sale of that product to that class of purchaser. The intent of this regulatory framework was to preserve the 'customary price differentials' between purchasers, which, in fact, serve to define 'class of purchaser' in § 212.31, by requiring the application of equal amounts of increased product costs to the May 15, 1973 selling price to each class of purchaser.

Id. While observing that, "[i]n general, these regulations have resulted in the equal application of increased product costs among classes of purchaser," the agency cited an "ambiguity" in the Regulations, which was that "sellers are not specifically required actually to charge the prices arrived at under the regulations." *Id.* The agency then specified the problem:

> As an improved supply situation has begun to have a restraining influence on prices, the [agency] has become aware that certain sellers have taken the position that they may selectively 'bank' increased product costs as to certain classes of purchaser, for recoupment in a subsequent month, as long as the prices charged to other classes of purchaser do not exceed the maximum lawful price. Such practices could obviously serve to avoid the intent of the overall framework of the price regulations, and the [agency] is undertaking to insure that these pricing practices are not put into effect.

Id.

To remedy this perceived situation, the agency, on September 5, 1974, published an amendment to its cost bank rule regarding the banking of increased "product" costs, effective September 1, 1974. The purposes of the amendment, which issued without a prior opportunity for public comment, were

> to clarify and make explicit the requirement that prices charged for each covered product must reflect the equal application of increased product costs to each class of purchaser, and that failure to charge prices that reflect equal application of increased product costs except to the extent the seller is precluded from charging such prices by the price term of a contract . . . will result in unrecouped increased product costs which the seller will not be permitted to recover in a subsequent month.
>
> * * * * * * * * * * * * *
>
> [to put] all sellers . . . expressly on notice that prices actually charged, and not merely prices calculated as a lawful maximum, must reflect the equal application of

> increased product costs, except where a pre-existing contract prevents the implementation of such a price.

Id. at 32306-07. As amended, the cost bank rule for special products now included an explicit equal application rule, with a deemed recovery component, and affected both actual and maximum lawful prices

> § 212.83. Allocation of refiner's increased product costs:
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> * * * * * *
>
> (d) *Carryover of costs.*
>
> * * * * * *
>
> (1) * * * With respect to each special product. . . . ., when a firm calculates the amount of increased product costs not recouped, which may be added to the May 15, 1973 selling prices to compute the base prices for that special product in a subsequent month, it shall calculate its revenues as though the greatest amount of increased product costs actually added to the May 15, 1973 selling price of that special product and included in the price charged to any class of purchaser, had been added, in the same amount, to the May 15, 1973 selling price of such product and included in the price charged to each class of purchaser; except that, where an equal amount of increased product cost is not included in the price charged to a purchaser because of a price term of a written contract covering the sale of such product which was entered into on or before September 1, 1974, that portion of the increased product costs not included in the price charged to such a purchaser need not be included in the calculation of revenues.

10 C.F.R. § 212.83(d)(1), 39 Fed. Reg. at 32308. In explaining the rule, the agency stated that "[i]n order to make [the] requirement [concerning the equal application of increased product costs in prices actually charged] explicit," it was issuing an amendment to its "banking" provision:

> [F]or each product, the recoupment of increased product costs will be calculated on the assumption that the largest

> amount of increased product cost added to the May 15, 1973 selling price and included in the price charged to any class of purchaser was equally applied to the May 15, 1973 prices and included in the price charged to all classes of purchaser, without regard to whether such prices were in fact charged.

39 Fed. Reg. at 32307. An exception to this rule was where a contract in existence on or before September 1, 1974 required a seller to charge a price less than the price that would reflect the equal application of increased costs. *Id.* In this regard, the agency noted that the amendment to the carryover provisions did not "alter in any respect the ability of a seller to charge prices to all classes of purchaser of a covered product which reflect the application of less than all available increased costs, and to carry forward the amount of increased costs which are not applied for recovery in a subsequent month." *Id.* Instead, the agency stated, the "clarification simply makes explicit the limitation that a seller may not select among classes of purchaser of the same product those class as to which it will apply increased costs and those classes as to which it will 'bank' increased costs." *Id.* Next explaining that under "[t]his approach, which is implicit in the existing regulation . . . all sellers continue to be afforded the opportunity . . . to pass through all of their increased product costs," the agency went out to emphasize that

> [w]here, however, a seller chooses to charge prices for a product which reflect disparate application of increased product costs among classes of purchaser, the carryover of unrecouped increased costs will not be permitted to the extent that any class of purchaser had a lesser amount of increased costs applied to its prices than did another class of purchaser of the same product.

Id.

As for the suspension of the usual notice and comment opportunities, the agency announced that it had made a "finding" that an emergency existed which required immediate action. *Id.* at 32307-08. Stating that it had recently learned that "certain sellers have implemented and continue to implement

prices which do not conform to the . . . concept of preserving May 15, 1973 price differentials among various classes of purchaser," that the ambiguity in the Regulations made compliance efforts against such sellers more difficult, that a more favorable supply situation had strengthened the incentive not to apply the equal application requirement, and that announcement of the amendment as a mere proposal could draw attention to the ambiguity and prompt sellers to take advantage of the situation, the agency expressed its conclusion that "the continuation or initiation of such practices would be injurious to the public welfare." *Id.* at 32307. The agency then stated that it intended to have public hearings regarding proposed revisions to the Regulations, and that, at that time, it would receive public comments concerning the amendment to the cost bank rule. *Id.* Notice of the proposed hearings, the agency related, would appear "in the near future." *Id.*

The near future arrived on September 10, 1974. On that day, the agency published notice of a proposed "comprehensive revision" of the Regulations. *See* 39 Fed. Reg. 32718 (September 10, 1974). As represented by the agency, the revision was designed "to simplify and clarify the price regulations, while retaining the essential concepts of the regulations as they were initially issued"; "to eliminate regulatory restrictions that are no longer needed or are inappropriate in the context of current conditions"; and "to help restore the role of competition within the overall structure of the price regulations, so that traditional market forces may begin to supplant the rigid controls of price regulations as the price setting mechanism." *Id.* The proposed revision included both the elimination of the prenotification requirement regarding the recovery of increased "non-product" costs, and certain "modifications" of the rules governing the equal application of increased product costs, and the recoupment of unrecovered increased product costs. *Id.* at 32718-24.

With respect to the equal application requirement, the agency stated that the Regulations "generally require equal application of increased product costs to the May 15, 1973 prices of

each product among all classes of purchaser of that product", and that "[t]he results in a maintenance of the May 15, 1973 price differentials among classes of purchaser of each product from a refiner." *Id.* at 35722. The agency then noted its recent amendment to the cost bank rule, which

> clarified . . . the equal application [requirement] . . . to make clear that, to the extent that there is unequal application of . . . increased product costs in prices actually charged, the difference between the largest amount of increased product cost actually applied to the price charged to any class of purchaser of a product and any lesser amount applied to the price charged to another class of purchaser may not be recouped in a subsequent month, except to the extent that a higher price could not be charged because of a pre-existing written contract.

Id. The agency continued by expressing its "aware[ness]" that the equal application requirement "is responsible for an inflexibility in the price regulations which becomes more troublesome and causes more dislocations in the market as supplies of petroleum products increase and there is greater need for the price mechanism to begin to play its customary role in the market." *Id.* at 32722-23.

One of the "principal problem area[s]" caused by the rule's inflexibility, the agency reported, revolved around the nationwide marketing practices of some refiners, on the one hand, and the regional practices of other, independent marketers, on the other hand:

> A refiner marketing on a national basis is required . . . to add an equal increment to its May 15, 1973 prices for gasoline throughout the country. It may, however, be competing with regional marketers in one area that have prices on the average that are above its prices, while in another region, the regional marketers may have lower prices. The equal application requirement, in such circumstances, runs counter to the interests of independent regional marketers whose prices are higher than the national refiner's prices, since the national refiner would tend to expand its market at the expense of the higher-priced independent regional refiner in those circumstances.

> In effect, a nationwide refiner is unable to adjust its prices on a regional basis and must, as a practical matter, choose an increment of increased product cost to add to its May 15, 1973 prices which results in selling prices that are too high to be competitive in some markets and are too low in other markets.

Id. at 32723. The agency then explained the dilemma posed by this state of affairs:

> [A]ny relaxation of [the] equal application requirements on an area or regional basis could result in disproportionate pass-through of increased product costs in different regions of the country. On the other hand, there has traditionally been regional price flexibility which serves, among other things, to even out supply among various regions.

Id. As a proposed solution, the agency stated that it intended to "modify" the equal application rule so that it would "apply to all classes of purchaser of a product within the same recognized market area", and would "limit the largest increment of increased product costs which [could] be applied to the price of a product to an amount of increased product costs applied to that product in any other region." *Id.* This modification, the agency explained, would both "help protect the independent sector of the market" and "avoid the possibility of undue regional price disparities." *Id.* The agency then requested comments on whether the limitation on regional price flexibility was necessary, and, if so, whether the suggested ten percent limitation was appropriate. *Id.*

In addition to the problem attending the nation-wide marketing practices of certain refiners, the agency further indicated that a inflexibility inherent in the equal application requirement posed problems at the regional, as well as national, level. *Id.* Two examples were specifically cited by the agency in this regard. The first problem concerned a price disparity resulting from the Regulations' restrictions upon the recovery of increased "non-product" costs:

> [By] applying the same increment of increased product cost to diesel fuel sold at retail as is applied to diesel fuel

> sold through independent marketers (who have been permitted certain increased non-product cost related price increases), a refiner is very likely to be selling diesel fuel at refiner-owned and operated retail outlets at a lower price than the independent marketer, because the same non-product cost related price increases cannot be implemented by a refiner unless it prenotifies and becomes subject to profit margin limitations.

Id. The agency then made an apparent reference to the purpose of the three-cent rule: "A special provision was added to the refiner cost allocation formula to take this problem into account in sales of gasoline, but the problem remains as to other products." *Id.* The second problem mentioned by the agency centered upon the recovery of increased "product" costs and the situation of particular classes of purchaser:

> [A] refiner's ability to implement price increases which take into account the ability of a class of purchaser to absorb an increase, or to reflect the fact that a class of purchaser was paying atypically low prices on May 15, 1973, is restricted. Thus, for example, a pretrochemical plant or other industrial user of propane may have a May 15, 1973 price for the product that is 3¢ per gallon less than the May 15, 1973 price to wholesale distributors of propane for residential use. Current price regulations preclude an increase in the amount of increased product cost applied to propane sold for industrial use unless an equal increment is applied to the propane sold for residential use.

Id. Given these problems, the agency proposed

> to amend the equal application requirement so that different amounts of increased product costs may be added to the prices charged to different classes of purchaser of a product, provided that the amount added to the prices charged to any class of purchaser that includes independent marketers cannot be greater than the amount added to the prices charged to any other class of puchaser of the same product, except to the extent that a refiner is selling to a particular purchaser at a lower price under a pre-existing written contract.

Id. The agency explained that it proposed to modify, rather than eliminate, the equal application requirement because the

rule "served to protect the independent sector of the market." *Id.* Finally, the agency requested comments as to whether the amendment would offer sufficient protection to the independent sector, and as to whether other limitations on the application of increased product costs would be required. *Id.*

With respect to the rules concerning the banking of increased product costs, the agency proposed to limit the total amount of increased product costs that could be passed through in any month. *See id.* at 32723-24. The reason for this "modification," the agency stated, was that increased supplies were prompting refiners to sell products at prices reflecting less than a full pass-through of increased product costs and to increase their banks of increased product costs. *Id.* at 32723. In the event that a shortage situation should occur, the agency explained, there could be marked price increases, because "the maximum lawful prices which refiners could charge under current regulations would include a full pass-through in a single month of all banked costs accumulated over all of the proceeding months." *Id.* The agency believed that a limitation on the size of a refiner's bank would be an appropriate response to this state of affairs.

Following its discussion of the amendments, the agency invites public comments on the proposals, as well as "on aspects of the price regulations which have not specifically been addressed in this notice . . ." *Id.* at 32725. The agency requested that all comments be received by September 27, 1974, and designated September 30 and October 1, 1974 as hearing dates for the receipt of oral comments concerning the amendments. *Id.*

As published on September 10, 1974, the proposed modification of the equal application requirement appeared as an amendment to the rule governing the refiner's cost allocation computations for increased "product" costs:

§ 212.83. Allocation of refiner's increased costs.

* * * * * *

(c) *Allocation of increased costs*—(1) *General rule*—(i) *Increased product costs.* In

computing base prices for a covered product, a refiner may increase its May 15, 1973 selling price to each class of purchaser each month beginning with November 1973 by an amount to reflect the increased product costs attributable to sales of covered products using the differential between the month of measurement and the month of May, 1973, provided that the amount of increased costs used in computing a base price is calculated by use of the general formula . . . and provided that the amount of increased product costs included in computing base prices of a particular covered product must be equally applied to each class of purchaser. In apportioning any amount of increased product costs to covered products, a refiner may apportion the total amount of increased product costs to a particular covered product in whatever amount it deems appropriate.

(ii) (*Increased non-product costs*. In computing allowable prices in excess of base prices for a covered product, a refiner may increase its price above base price to each class of purchaser each month beginning with October 1974 by an amount to reflect the increased non-product costs attributable to sales of covered products in the month of measurement, using the differential between the month of measurement and the month of May, 1973, provided that . . . the amount of increased non-product costs included in computing allowable prices above base price of a particular covered product must be equally applied to each class of purchaser. In apportioning any amount of increased non-product costs to covered products, a refiner may apportion the total amount of increased non-product costs to a particular covered product in whatever amount it deems appropriate.

(iii) *Exceptions to equal application rule*. Notwithstanding the provisions of paragraphs (c)(1) (i) and (ii) above, a refiner may comply with the provisions of this paragraph by apply-

> ing increased costs equally among classes of purchaser within recognized marketing areas, and need not apply increased costs equally among classes of purchaser in different marketing areas, provided that the largest amount of increased product cost applied to the May 15, 1973 selling price of any product in any marketing area shall not exceed by more than 10 percent the amount of increased product cost applied to the May 15, 1973 selling price of that product in any other marketing area; and, further, a refiner may comply with the provisions of this paragraph within any particular marketing area by applying unequal amounts of increased costs among classes of purchaser of a product, provided that no greater amount of increased costs is applied to the May 15, 1973 selling price of any product in sales to any class of purchaser which includes an independent marketer. . . ., than is applied to the May 15, 1973 selling price of that product in sales to all other classes of purchaser in that marketing area.

Id. at 32727. The cost bank rule was published in a proposed form without a deemed recovery feature:

> § 212.83. *Allocation of refiner's increased costs.*
>
> * * * * * *
>
> (d) *Carryover of costs.* (1) If, in any month beginning with October 1973, and ending with September 1974, a firm charges prices for covered products which result in the recoupment of more or less total revenues than the entire amount of increased product costs calculated pursuant to the general formula and allowable under paragraph (c)(1)(ii) of this section, the excess revenues recouped must be subtracted from the May 15, 1973 selling prices and the amount of increased product costs not recouped may be added to May 15, 1973 selling prices to compute the base prices for covered products in the subsequent month provided that the amount of the increased product cost not recouped and included in computing the base prices of a particular covered product must be equally applied to each class of purchaser.

(2) If, in any month beginning with October 1974, a firm charges prices for covered products which result in the recoupment of more total revenues than the entire amount of increased product costs calculated pursuant to the general formula and allowable under paragraph (c)(1)(ii) of this section, the excess revenues recouped must be subtracted from the May 15, 1973 selling prices to compute base prices for covered products in the subsequent month. If, in any month beginning with October 1974, a firm charges prices for covered products which result in the recoupment of less total revenues than the amount of increased product costs calculated pursuant to the general formula, only the amount of increased product costs not recouped because of lesser sales volumes than were estimated for the current month may be added to the May 15, 1973 selling prices to compute prices for covered products in the subsequent month.

Id. at 32728-29.

Subsequent to the September 10, 1974 notice, the agency in fact received oral and written comments regarding revisions of the Regulations. Thereafter, on December 5, 1974, the agency published several final amendments to the Regulations concerning the pass-through of increased "non-product" costs, effective December 1, 1974. *See* 39 Fed. Reg. 42368 (December 5, 1974). With respect to "all other revisions to the price regulations proposed in the September 10 notice", the agency stated that it was deferring action "until a later date", while keeping the matters "under active consideration." *Id.* In this regard, the agency, without any discussion in the preamble, published as a final amendment a cost bank rule, applicable to increased "product" costs, with a deemed recovery component:

§ 212.83 Allocation of refiner's increased costs.

* * * * * *

(e) *Carryover of costs.* (1) If in any month beginning with October 1973, a firm charges prices for a special product which result in the recoupment of less total revenues than the entire amount of increased product costs calculated for that product pursuant to the general

formula and allowable under paragraph (c)(1)(i) of this section and that unused amount of increased costs is not used to increase May 15, 1973 selling prices pursuant to paragraph (c)(1)(ii) of this section, the amount of increased product cost not recouped may be added to the May 15, 1973 selling prices to compute the base prices for that special product for a subsequent month. . . . With respect to each special product, . . . when a firm calculates the amount of increased product cost not recouped, which may be added to the May 15, 1973 selling prices to compute the base prices for that special product in a subsequent month, it shall calculate its revenues as though the greatest amount of increased product costs actually added to any May 15, 1973 selling price of that special product and included in the price charged to any class of purchaser, had been added, in the same amount, to the May 15, 1973 selling price of that special [prod]uct and included in the price charged to each class of purchaser; except that, where an equal amount of increased product cost is not included in the price charged to a purchaser because of a price term of a written contract covering the sale of such product, which was entered into on or before September 1, 1974 that portion of the increased product costs not included in the price charged to such a purchaser need not be included in the calculation of revenues. If in any month beginning with October 1973, a firm charges prices for a special product which result in the recoupment of more total revenues than the entire amount of increased product costs calculated for that product pursuant to the general formula and allowable under paragraph (c)(1)(i) of [this] section, the amount of excess product costs recouped must be subtracted from the May 15, 1973 selling prices to compute the base prices for that special product for the subsequent month.

10 C.F.R. § 212.83(e)(1), 39 Fed. Reg. at 42372 (December 5, 1974)

Additional final amendments were published on December 24, 1974 39, Fed. Reg. 44407, on January 16, 1975, 40 Fed. Reg. 2795, and on August 29, 1975, 40 Fed. Reg. 39850. As with the December 5, 1974 changes, the amendments addressed matters unrelated to the equal application and deemed recovery rules pertaining to motor gasoline. Moreover, the agency continued to defer formal consideration of the revisions proposed in the September 10 notice of proposed rulemaking.

On October 22, 1975, the agency issued a notice of proposed rulemaking on the question of whether the Regulations should, *inter alia* "permit limited regional pricing by refiners, resellers, and retailers." 40 Fed. Reg. 49372 (October 22, 1975). In the notice, the agency first explained that the amendment as proposed on September 10, 1974, to allow regional exceptions from the equal application requirement had not been adopted because of fears that the changes might result in higher prices, especially for home heating oil, and because of perceived administrative problems in implementing the changes. *Id.* The agency, however, stated that it "continue[d] to be of the view that at least a limited amount of regional price flexibility should be permitted, as an essential step toward reducing the rigidity of the pricing regulation. . . ." *Id.* The age then proposed to issue a regional price rule that would allow a differential among regions of up to two cents per gallon in the amount of costs used to determine the selling price of covered products and requested comments on whether the differential was an appropriate amount. *Id.* at 49372-73. In addition, the agency proposed to allow "regional price flexibility on a product-by-product basis", thus permitting flexibility for gasoline, for example, but not for certain oils. *Id.* at 49373. With respect to both proposals, the principal issue confronted by the agency, it appears, concerned "the definition of the 'region' within which equal application of increased costs will continue to be required." *Id.* The agency hence specifically requested comments on the definition of "region", as well as on the general

matter of regional pricing. *Id.* Meanwhile, the proposed rule read:

§ 212.83 Allocation of refiner's increased costs.

* * * * * *

(c) *Allocation of increased product costs*—(1) *General rule*—(i) *No. 2 oils and gasoline.* In computing base prices for sales of No. 2 oils and gasoline, a refiner may increase its May 15, 1973 selling price to each class of purchaser each calendar month beginning with November 1973 by an amount to reflect the increased product costs attributable to sales of that covered product using the differential between the month of measurement and the month of May, 1973, provided that the amount of increased costs used in computing a base price is calculated by use of the formula set forth in paragraph (c)(2)(i) of this section, and that the formula of paragraph (c)(2)(i) of this section is computed separately for No. 2 oils and for gasoline, and that the amount of increased product costs included in computing base prices of No. 2 oils and of gasoline is equally applied to each class of purchaser.

* * * * * *

(v) *Regional pricing exemption to the equal application rule.* A refiner may comply with the provisions of § 212.83 (c)(1) . . . as to No. 2 oils, gasoline, and each particular general refinery product by applying increased costs equally among classes of purchaser of each product within each region, and need not apply increased product costs equally among class of purchaser of each product in different regions provided that the largest amount of increased product cost applied to the May 15, 1973 selling price of any product in any region shall not exceed by more than two cents per gallon the amount of increase product cost applied to the May 15, 1973 selling price of that product in any other region.

Id. at 49374-75.

Following subsequent public hearings and comments on this issue of regional price flexibility, the agency on July 21, 1976, published a final rule amending 10 C.F.R. § 212.83(h):

212.83 (h) *Equal application among classes of purchaser—*

(1) *General rule.* Except as provided in subparagrap[h] (2) of this paragraph, when a firm calculates the amount of increased costs not recouped that may be added to May 15, 1973, selling prices to compute maximum allowable prices in a subsequent month, it shall calculate its revenues as though the greatest amount of increased costs actually added to any May 15, 1973 selling price of the product concerned and included in the price charged to any class of purchaser, had been added, in the same amount, to the May 15, 1973, selling prices of that product and included in the price charged to each class of purchaser.

(2) *Special rule*—(i) *Gasoline.* When a firm calculates the amount of increased costs not recouped that may be added to May 15, 1973, selling prices of gasoline to compute maximum allowable prices in a subsequent month, it may, notwithstanding the general rule in subparagraph (1) above, compute revenues as though (A) the greatest amount of increased costs actually added to any May 15, 1973, selling price of gasoline and included in the price charged to any class of purchaser in a particular region (as defined in § 212.82), had been added, in the same amount, to the May 15, 1973, selling prices of that product and included in the price charged to each class of purchaser in that region, and (B) the greatest amount of increased costs actually added to the May 15, 1973, selling price of gasoline and included in the price charged to any class of purchaser in any region had been added, in the same amount (less any actual differential or three cents per gallon, whichever is less) to the May 15, 1973, selling prices of that product and included in the price charged to any class of purchaser in any other region.

> (3) *Exceptions*. (i) Where an equal amount of increased costs is not included in the price charged to a purchaser because of a price term of a written contract covering the sale of the product concerned that was entered into on or before September 1, 1974, that portion of the increased costs not included in the price charged to that purchaser need not be included in the calculation of revenues as otherwise required by subparagraph (1) or (2) above.

41 Fed. Reg. 30024-25 (July 21, 1976). As the agency explained, the former equal application rule had been interpreted as preventing the "banking" of costs where a refiner had engaged in unequal intra- and inter-class pricing. *Id.* at 30021. Such an interpretation, according to the agency, had "resulted in selling prices which are either too high or too low to be competitive in many instances, where a refiner marketing on a national basis is in competition with regional local marketers." *Id.* The new amendment would modify this rule to permit, without a deemed recovery "penalty", the unequal application of increased costs among regions defined by PAD (Petroleum Administration Defense) districts:

> [A] refiner marketing on a national basis, or one marketing in more than on PAD district, may, without penalty as to the carry-forward of unrecouped costs . . ., pass through increased costs to a class of purchaser of gasoline located in one PAD district in amounts which exceed by not more than 3 cents per gallon the amount of increased costs passed through to any class of purchaser of gasoline located in any other PAD district.

Id. See id. at 30023. Moreover, the agency noted that "[b]ecause the members of classes of purchasers are not necessarily confined to a single PAD district," refiners would be able to charge varying prices within a class, so long as the prices were not violative of the "normal business practice" policy of 10 C.F.R. § 210.62(b). *Id.* Hence, the agency observed, "the '3-cent rule' adopted today applies with respect to intra-class price variations, as well as to price variations between classes of purchaser, which are instituted pursuant to today's amendments." *Id.*

On January 27, 1977, the agency published various amendments affecting the pricing of gasoline. One change modified the definition of "d_{ju}", altering it from a cents per gallon figure to a total dollar amount of increased costs that a refiner could recover through sales:

§ 212.83 Price Rule

* * * * * *

(c) *Allocation of increased costs.*

* * * * * *

d_{ju} = The total dollar amount a refiner may apportion in the period "u" to . . . gasoline. . . .

10 C.F.R. § 212.83(c)(2). *See* 42 Fed. Reg. 5030, 5031 (January 27, 1977). Conspicuously absent from this amendment was the "three can retail price equalization rule, which had been an express feature of the former rule.

On May 5, 1977, the agency issued a "corrective amendment" to the Price Rule:

§ 212.83 Price Rule

* * * * * *

(h) *Equal Application among classes of purchaser* * * *

(2) *Special Rules* * *

(iv) *Retail sales of gasoline by refiner.* When a refiner calculates the amount of increased costs not recouped that may be added to May 15, 1973, selling prices of gasoline to compute maximum allowable prices in a subsequent month, it may, notwithstanding the general rule in paragraph (b)(1) of this section, compute revenues as though (A) the greatest amount of increased costs actually added to any May 15, 1973, selling price of gasoline and included in the price charged to any class of purchaser that purchases gasoline at retail from a refiner at any service station operated by employees of the refiner had been added to the May 15, 1973

> selling prices of that product and include in the price charged to each class of purchaser that purchases gasoline at retail from a refiner at any service station operated by employees of the refiner and (B) the greatest amount of increased costs actually added to the May 15, 1973, selling price of gasoline and included in the price charged to any class of purchaser that purchases gasoline at retail from a refiner at any service station operated by employees of the refiner had been added, in the same amount (less any actual differential or three cents per gallon, whichever is less) to the May 1973 selling prices of gasoline and included in the price charged to all other classes of purchaser.

10 C.F.R. § 212.83(h)(2)(iv), 42 Fed. Reg. 22882 (May 5, 1977). In its discussion of the changed rule, the agency stated that the amendment "merely replaces a provision inadvertently omitted" in January, 1977, that had been "previously found in the definition of 'd_{ju}'" and that "permits a refiner to add three cents more of increased costs to the prices of gasoline sold at retail by employ of the refiner than that refiner adds to the prices of gasoline so at other levels of distribution." *Id.* at 22881. Moreover, the agency explained that the amendment served to clarify the equal application and deemed recovery requirements:

> This amendment makes explicit the requirement that the equal application rule continues to apply to sales of gasoline at retail by a refiner, that is, that recovery of increased costs by refiners is computed as though the greatest amount of increased costs included in the selling price to any class of purchaser that purchases gasoline at retail from a refiner had been included in the selling price to all such classes of purchaser. This requirement was implicit in the earlier definition of "d_{ju}" and does not represent a change from the earlier provision.

Id. As for the placement of the amendment, the agency stated that the provision "more appropriately appertains to the topic of § 212.83(h)", and that "reinsertion" in § 212.83(c)(2) would be "awkward". *Id.* The agency noted further that "no substan-

tive change is involved or intended by this change in placement," and indicated that because the amendment was "only to correct an inadvertent omission", "good cause" existed to issue the amendment without notice and opportunity for comment. *Id.* Finally, the agency asserted that the amendment "merely restores the regulations to the previous status, and is not intended to change their effect." *Id.*

In January, 1979, Mobil commenced the instant action, contesting the validity of the "new" three-cent rule, as published on May 5, 1977, and, alternatively, the validity of the equal application rule with the deemed recovery component, as published on September 5, 1974. In the ensuing months, Exxon, Gulf, and Marathon joined as plaintiff-intervenors.

Subsequently, the agency expressed an opinion that the equal application requirement posed certain problems in the context of "banking": "The . . . rule . . . in some instances may cause certain refiners . . . to maintain a selling price in retail sales of gasoline well below those of independent retailers and well below those that would prevail in a competitive marketplace." 44 Fed. Reg. 54902 (September 21, 1979). To meet this problem, the agency proposed to amend § 212.83(h) to permit refiners to increase from 3 cents to 7.9 cents the maximum cents per gallon differential. *Id.* at 54902, 54905-06.

On April 29, 1980, the agency published an amendment to § 212.83(h), raising the cents per gallon differential to 8.6 cents. 45 Fed. Reg. at 28303-04 (April 29, 1980). At this time, the agency observed again that "the equal application rule is causing refiners to sell gasoline in retail sales at prices substantially below those of independent retailers and those that exist in the current competitive marketplace", thus creating "serious competitive imbalances in current retail markets." *Id.* at 28303. In this regard, the agency reported that refiners had indicated in comments concerning the amendment that they "may not be able to take full advantage of the [new rule] since within the retail sales category they would still be deemed to recoup any increase in one retail sale on all other retail sales."

Id. at 28302. The agency then express its intent to issue a notice of proposed rulemaking "regarding further amendments to the equal application rule." *Id.* at 28303.

In June, 1980, the agency instituted rulemaking proceedings in regard to a proposal to eliminate the equal application rule. 45 Fed. Reg. 44238 (June 30, 1980). In the notice, the agency remarked that the rule had protected various classes of purchaser by requiring that increased costs "be allocated equally to each class of purchaser and within each class of purchaser", and that the rule had helped "to maintain the historical differentials in prices between and among classes of purchasers in order to ensure that petroleum products are distributed at equitable prices." *Id.* at 44239. Nonetheless, the agency stated that it was considering modifying or eliminating the rule "in light of current needs and requirements," "because, while maintaining historical differentials ensures equitable prices for a certain period of time, at some point a change in society, the economy, and the petroleum market could make the historical differentials inequitable and anomalous." *Id.* Additionally the agency noted that an equal application rule for refiners seemed to be "an anomaly", particularly at the retail level, inasmuch as changes in certain price rules had resulted in the effective elimination of an equal application rule applicable to retailers and to most resellers and reseller-retailers. *Id.* Moreover, the agency indicated that because "the equal application rule tends to discourage the imposition of significant price differentials among similarly situated customers and therefore may reduce the pricing flexibility of those subject to it", and because it was contemplated that gasoline would be decontrolled "as soon as market conditions allow", "modifications to or elimination of the equal application rule" were being considered as possible means of "introduc[ing] a greater degree of pricing flexibility and market competition." *Id.* In this regard, the agency remarked that "[i]n a regime of full scale and pervasive controls . . . a reduction in pricing flexibility may be justified, because the conditions that make pervasive controls necessary suggest that free market competition is inadequate to allocate products

equitably at equitable prices." *Id.* The agency "conclu[ded]", however, that "at this time and given the current and projected petroleum stocks, and decreased demand, allocation of increased costs by market forces will result in equitable pricing, while at the same time furthering the EPAA objective of minimizing unnecessary interference with market mechanisms." *Id.*

The agency went on to propose, first, an amendment of the equal application rule, with its deemed recovery feature, that would exempt retail sales of gasoline from the rule. *See id.* at 44239, 44241, 44243. Such an amendment, the agency explained, "would not increase the total amount of allowable increased costs that could be passed through", inasmuch as costs assessed at retail would "result in a reduction in the allowable increased costs available for use at other marketing levels or in the firm's banks". *Id.* at 44239, 44243. Also, the agency stated, the amendment "would permit refiners . . . to allocate their increased costs in a different and more flexible manner", *id.* at 44239, 44243, and would remove a "regulatory-induced incentive for refiners . . . to undercut their independent competition," *id.* at 44240. Anti-trust laws, or other legislation, the agency asserted, would deal with any predatory pricing practices that could adversely impact the independent sector. *Id.* at 44240. As an alternative to this proposed amendment, the agency suggested (1) the total elimination of the equal application rule at both wholesale and retail levels; (2) the elimination of the equal application rule at the retail level, only to the extent that the amount of increased costs added to retail selling prices of gasoline is equal to or greater than the weighted average amount of increased costs added to selling prices of gasoline at wholesale or (3) the elimination of the equal application rule at both wholesale and retail levels, only to the extent that the amount of increased costs added to retail selling prices of gasoline is equal to or greater than the weighted average amount of increased costs added to selling prices of gasoline at wholesale. *Id.* at 44240, 44241-43.

Following public hearings on the matter, the agency, on November 5, 1980, adopted a final rule deleting the equal application rule with respect to all sales of gasoline. 45 Fed. Reg. 72626 (November 3, 1980). In its published form, the new rule provided

> § 212.83 Price rule
>
> * * * * *
>
> (h) *Equal application among classes of purchaser.*
>
> (2) *Special rules*— (i) *Gasoline.* All sales of gasoline are exempt from the provisions of this paragraph.

10 C.F.R. § 212.83(h)(2)(i), 45 Fed. Reg. at 72630. In discussing the change, the agency stated that the equal application rule had "created a disincentive for refiners to increase any retail sale price unless every retail price could be raised", because the deemed recovery rule applied within a class of purchaser as well as between classes of purchaser." *Id.* at 72627. The agency observed also that deletion of the rule would afford refiners "the pricing flexibility to recoup increased costs allocated to gasoline as they deem appropriate"; would "foste[r] competition in the market place generally, minimiz[e] regulatory interference with market mechanism and promot[e] economic efficiency"; and would, "in the long run", benefit the consumer as well as the industry. *Id.* at 72628. The agency emphasized, however, that in eliminating the rule, it was "specifically reject[ing] suggestions made by some refiners that the equal application rule was always inappropriate." *Id.* On this point, the agency stated: "DOE continues to believe that maintenance of historical price differentials in the pass-through of increased costs is in a supply shortage the most appropriate means, if not the *only* means, of ensuring equitable pricing, a specific purpose of the EPAA." *Id.* Additionally, the agency expressed its belief that "the adequate supply environment and the competitive marketplace will provide the primary safeguard against anticompetitive pricing by refiners", noting that comments of the Antitrust Division of the Department of Justice had supported the elimination of the

equal application rule. *Id.* Finally, the agency observed that in the notice of proposed rulemaking,

> we suggested that it was our tentative belief that the equal application rule created a regulatory inducement for refiners both to undersell independent competitors in certain situations and not to reduce prices to marketers to meet price competition in other situations, and that this inducement could have serious long-term effects on the independent sector of the industry.

Id. at 72628-29. Upon consideration of the rulemaking record, how the agency stated that it had determined that there was "n[o] . . . support" in the record for the conclusion that the equal application rule harmed the independent sector, and thus rejected its tentative belief as "unfounded". *Id.* at 72629. In emphasizing that its deletion of the equal application rule was "not based on any determination that such elimination is necessary to aid the independent sector of the market", the agency explained that, as noted by both independent marketers and refiners, and by the DOE Office of Special Counsel, "most of the current petroleum product price disparities can be attributed to the crude oil cost disparities between refiners, not the equal application rule." *Id.* at 72629.

After all this regulatory activity, on January 30, 1981, President Reagan published Executive Order No. 12287, which abolished the Mandatory Petroleum Price Regulations, 10 C.F.R. Part 212. 46 Fed. Reg. 9909 (January 30, 1981).

Before addressing the merits of the parties' motions, it is necessary to come to terms with a point of dispute among the parties concerning the subject matter of this lawsuit.

The plaintiffs contend that the controversy before the Court centers upon the nature and scope of the May 5, 1977, three cent rule, because prior to May 5, 1977, recoveries under the original three cent rule that were passed through in actual selling prices below base prices had been exempt from any equal application penalty. On this point, the plaintiffs seek a declaration that the original three cent rule permitted refiners to apply, without penalty, unequal increased cost increment to

actual motor gasoline prices below base prices charged to firms in the class of refiner-operated stations; that the September 5, 1974, deemed recovery rule was not applicable to recoveries from refiner-operated stations under the three-cent rule; and that the May 5, 1977 three-cent rule was unlawfully promulgated. Alternatively, if this Court were to declare the May 5, 1977 three cent rule to be valid, the plaintiffs seek a declaration that the September 5, 1974 deemed recovery rule was procedurally and substantively invalid.

The defendants, on the other hand, argue that the plaintiffs' grievance is with the requirement that the unequal application of increased product costs in actual sale prices below base prices of motor gasoline through refiner-operated stations falls within the reach of a deemed recovery rule. If such a requirement existed prior to the January 27, 1977, deletion of the three-cent rule, then the May 5, 1977 three-cent rule, the defendants argue, would be procedurally valid under the interpretative rule exception to rulemaking requirements, irrespective of where the "new" rule was positioned in the Regulations. If there were no preexisting requirement, the defendants accept the plaintiffs' contention that reinsertion of the May 5, 1977 three cent rule as part of the deemed recovery rule was procedurally deficient. In this regard, the defendants assert that beginning with the September 5, 1974, deemed recovery rule, all recoveries under the three-cent rule were subject to a cost recovery penalty. Accordingly, the defendants seek a declaration that the September 5, 1974, equal application rule, with its deemed recovery component, was procedurally and substantively valid.

The disagreement among the parties stems, in part, from the agency's statement in the May 5, 1977, preamble that the equal application and deemed recovery rules "[were] implicit in the earlier definition of 'd_{pa}'." 42 Fed. Reg. at 22881 (May 5, 1977). The plaintiffs have construed this language as meaning that the April 4, 1974 three-cent rule contained an equal application requirement, with a deemed recovery component, which pertained to actual sale prices at refiner-operated sta-

tions. The defendants, however, argue that it was the promulgation of the September 5, 1974 rule that brought the unequal application of costs in actual sales to the group of refiner-operated stations within the scope of a deemed recovery penalty; that no regulaton in effect in April, 1974, expressly addressed the issue of whether refiners could unequally apply the three-cent differential in actual selling prices below base prices, and, if so, whether refiners could do so between individual stations; and that the cited language in the May 5, 1977 preamble referred to the April, 1974 definition of "d_{iu}" as implicit modified by the September 5, 1974 rule.

Despite this difference of opinion, both parties appear to accept the proposition that the procedural validity of the May 5, 1977 three-cent rule turns upon the agency's assertion that the rule did not effect a substantive change in the Regulations. Given this common ground, in order to determine whether the scope and effect of both the original three-cent rule and the September 5, 1974 equal application rule, with its deemed recovery component.

At this juncture, the defendants raise the objection that the plaintiffs' action is barred by the doctrine of laches. Inasmuch as the focus of this action is upon the May 5, 1977 three cent rule, and in view of the relatively brief period of time between the issuance of the rule and the commencement of this action, and the plaintiffs' efforts to seek clarification of the rule prior to filing suit, this Court is not inclined to dismiss this action on the ground of laches.

A

In suport of their contention that the original three-cent rule gave refiners flexibility in passing-through increased product costs in actual retail prices at refiner-operated stations, the plaintiffs assert that the rule only pertained to the computation base prices and not to the computation of actual prices below base prices; that the rule did not require refiners to charge uniform base prices or uniform selling prices below base prices; that the rule permitted refiners to pass-through unequal in-

creased product cost increments in retail sales; that no deemed cost recovery penalty inhered in the original rule; and that an equal application requirement of a deemed recovery penalty affecting actual selling prices at refiner-operated stations would be inconsistent with the purpose of the original three-cent rule, which was to equalize prices between independents and refiners according to individual market conditions.

The defendants share the plaintiffs' views that the original rule concerned base prices, and that the rule set forth no explicit requirement that refiners charge equal increments of increased product costs where selling prices were below base prices, or else be subject to a cost recovery penalty. the defendants argue further however, that the original three-cent rule sanctioned unequal increased product cost increments in base prices only as between retail purchasers of gasoline at refiner-operated stations and all other sales, and disallowed unequal increased product cost increment in base prices among retail purchasers at refiner-operated stations.

Examining the language of the origninal three-cent rule, the general provision provides that a refiner "may" apply "the" dollar increase, or d_{pu} increment to the May 15, 1974 selling price of motor gasoline "to each class" to determine the base price "to each class." The exception to this general provision provides that "the dollar increase that a refiner "may" apply to the May 15, 1973 selling price of motor gasoline to determine "the base prices to the classes" of retail purchasers at refiner-operated stations "may" be d_{pu} plus three cents per gallon, so long as a refiner deducts from formula used to arrive at the d_{pu} increment a sum represented by "the actual amount of cents per gallon increase added to d_{pu} . . . multiplied by the estimated number of gallons . . . to be sold" during the relevant time period at retail at refiner-operated stations.

Several conclusions may be drawn from this language. For example, as all parties recognize, the rule refers only to the computation of base prices, not to the computation of actual selling price below base prices. Moreover, the usage of the

word "may" in both the general provision and the exception suggest that a refiner could exercise its discretion in determining the amount of increased product costs to pass-through in calculating base prices. In this regard, the Temporary Emergency Court of Appeals [TECA] has indicated that under the base price rules, a refiner was not required to add *all* increased product costs arrived at under the general formula in determining base prices; that a refiner could vary its base prices according to the amount of increased product costs applied to May 15, 1973 selling price was the maximum allowable base price, rather than the only base price. *See Standard Oil Company* v. *DOE*, 596 F.2d 1029, 1040-45 (TECA 1978). This decision of TECA appears to dispose of any claim that under the general provision, the same increased product cost increment had to be applied in determining base prices to various classes. As for the exception, it appears that a refiner was also not required to apply equal increased product cost increments to retail prices at refiner-operated stations. Certainly the permissive nature of the rule, which allowed a refiner to pass through "a maximum" of three cents per gallon, implies that no uniform increment was required to be imposed. The preamble conveys a similar impression. *See* 39 Fed. Reg. at 12013 (April 2, 1974). More importantly, the language of the exception seems to paraphrase and relate back to the language of the general provision, indicating that, within the three cents per gallon limitation, the pass-through of increased product costs among refiner-operated stations is left to the refiners' discretion. Because the agency's contrary positions, *see*, *e.g.*, Interp. 78-53 [Mobil Oil Corp.], 43 Fed. Reg. 40207 (September 11, 1978). Interp. 78-36 [Atlantic Richfield Co.], Enf. Man. (CCH) ¶ 56,427, at 56,583-84 (July 10, 1978)/ Interp. 75-5 [Phillips Petroleum Co.], Enf. Man. (CCH), ¶ 56,246, at 56,266 (February 14, 1975), *aff'd*, 2 FEA ¶ 80,599 (May 30, 1975); 39 Fed. Reg. at 32722, 32723 (September 10, 1974); 39 Fed. Reg.. at 32307 (September 5, 1974), cannot be reasonably harmonized with the language of the origninal three cent rule, they are entitled to little weight. *See*, *e.g.*, *United States* v. *Larionoff*, 431 U.S. 864, 872-73 (1977); *Udall* v. *Tallman*, 380

U.S. 1, 16-17 (1965); *Pennzoil Co.* v. *DOE*, F2d slip opinion, at 35 n. 27 (TECA April 6, 1982); *Wiggins Brothers Inc.* v. *DOE*, 667 F.2d 77, 88 (TECA 1981), *cert. denied*, 102 Ct. 1749 (1982); *Koch Refining Co.* v. *DOE*, 658 F.2d 799, 803 (TECA 1981 *UPG, Inc.* v. *Edwards*, 647 F.2d 147, 156-58 (TECA 1981); *Standard Oil Co.* v. *Doe*, 596 F.2d at 1055-56; *Perine* v. *William Norton & Co.*, 509 F.2d 114, 120 (2d Cir. 1974).

The Court shall now examine the September 5, 1974 equal application rule in light of this construction of the original three cent rule.

B.

In their challenge to the operation of the September 5, 1974 rule, the plaintiffs assert that the actual dollar amount of costs recovered under the three-cent rule would be subtracted from the amount of increased product costs otherwise available for recovery, such that it was the d_{ju} increment, and not the three-cent rule allowance, that would be equally applied under the September 5, 1974 rule. Additionally, the plaintiffs contend that, in any event, the September 5, 1974 equal application rule, with the deemed recovery component, was procedurally and substantively invalid. With respect to this latter issue, the plaintiffs argue that the defendants are collaterally estopped by the decision in *Lakes Gas Co.* v. *DOE*, 477 F. Supp. 187 (D. Minn. 1979), *reaffirmed in Western Petroleum Co.* v. *DOE*, F. Supp., CV 3-80-626 (D. Minn. March 20, 1981), from relitigating the procedural validity of the rule. Because of the defendants' representations concerning the presentation of this issue to the *Lakes Gas* Court, this Court shall decline to apply the doctrine of offensive collateral estoppel.

In response to the plaintiffs' arguments, the defendants assert that the September 5, 1974 rule, by its own terms, applied to recoveries of *all* increased product costs passed through in actual selling prices below base prices. As tor the lawfulness of the rule the defendants contend that the rule was procedurally valid under the "good cause" exception to the

requirement of rule-making proceedings and that the rule was substantively valid under the EPAA.

It is true, as asserted by the defendants, that insofar as the September 5, 1974 rule referred to "increased product costs," it did not expressly exempt recoveries under the original three-cent rule. There is also some merit, however, to the plaintiffs' position that the September 5, 1974 rule did not affect recoveries under the three-cent rule, to the extent that under the terms of the original three cent rule, such recoveries were not included in the final d amount of increased product costs.

Because this Court must conclude that the September 5, 1974 rule was procedurally invalid, it becomes unnecessary to resolve the dispute over the operation of the agency's formula for the calculation of increased product costs.

Both Section 4 of the APA, 5 U.S.C. § 553(b)(B), and Section 7 of the Federal Energy Administration Act [FEAA], 15 U.S.C. § 766(i)(B)(1974), *repealed*, Department of Energy Organization Act, § 709 (1977), permitted the agency to promulgate a regulation without prior notice and comment where good cause existed. Section 5 of the APA provides that the requirement of prior notice does not apply "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unncecessary, or contrary to the public interest." 15 U.S.C. § 553(b)(B). Section 7 of the FEAA allowed the agency to waive the requirements or prior notice and comment "where strict compliance is found to cause serious harm or injury to the public health, safety, or welfare, and such finding is set out in detail in such rule, regulation, or order." 15 U.S.C. § 766(i)(B).

Under the APA, courts have "reluctantly countenanced," *New Jersey* v. *EPA*, 626 F.2d 1038, 1045-46 (D.C. Cir. 190), and narrowly construed the good cause exception. *See*, *e.g.*, *Kollett* v. *Harris*, 619 F.2d 134, 145 (1st Cir. 1980); *Sharon Steel Corp.* v. *EPA*, 597 F.2d 377, 379-80 (3rd Cir. 1979); *U.S. Steel* v. *EPA*, 595 F.2d 207, 214 (5th Cir.), *clarified on other*

grounds, 598 F.2d 915 (5th Cir. 1979); *National Nutritional Foods Ass'n* v. *Kennedy*, 572 F.2d 377, 384 (2d Cir. 1978); *American Iron & Steel Inst.* v. *EPA*, 568 F.2d at 292. Such cautious approaches to the "good cause" exception find ample support in the legislative history surrounding the APA:

> "Impracticable" means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings. "Unnecessary" means unnecessary so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved. "Public interest" supplements the terms "impracticable" or "unnecessary;" it requires that public rule-making procedures shall not prevent an agency from operating, and that, on the other hand, lack of public interest in rule-making warrants an agency to dispense with public procedure.

S. Rep. No. 752, 79th Cong., 1st Sess., at 16 (1945). *See* S. Rep. No. 248, 79th Cong., 2d Sess., at 200 (1946); Attorney General's Manual on the Administrative Procedure Act, at 12-13 (1947).

Because of the narrow scope of the "good cause" exception, it is insufficient for an agency merely to state that good cause exists *See, e.g., Mobil Oil Corp.* v. *DOE*, 610 F.2d 796, 803 (TECA 1979), *cert. denied*, 446 U.S. 937 (1980). It is sufficient, however, if a recital of good cause is justified by obvious and compelling facts that can be judicially noticed. *See, e.g., Shinek* v. *DOE*, F.2d slip opinion, at 5-6 (TECA September 14, 1981); *Kollett* v. *Harris*, 619 F.2d at 144-45; *National Helium Corp.* v. *FEA*, 569 F.2d 1137, 1141-46 (TECA 1975); *Nader* v. *Sawhill*, 514 F.2d 1064, 1068-69 (TECA 1975); *Reeves* v. *Simon*, 507 F.2d 455, 458-59 (TECA 1974), *cert. denied*, 420 U.S. 991 (1975); *California* v. *Simon*, 504 F.2d 430, 439 (TECA 1974), *cert. denied sub nom. California* v. *Sawhill*, 419 U.S. 1021 (1974); *DeRieux* v. *The Five Smiths Inc.*, 459 F.2d 1321, 1332-33 (TECA), *cert. denied*, 419 U.S. 896 (1974).

The FEAA "good cause" exception was also narrowly construed. As evidenced by the legislative history of the FEAA, Congress intended that the agency would use this exception "very sparingly." Conference Rep. No. 788, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News, at 2977. Like the practice under the APA, in order to invoke the FEAA provision, the agency had to make a published, or unpublished, finding of good cause. *See, e.g., Standard Oil Co.* v. *DOE*, 596 F.2d at 1062.

Examining the September 5, 1974 rule under the APA standards it appears from the preamble, and from the agency's present discussion of the market conditions surrounding the promulgation of the September 5, 1974 rule, that the basis for the assertion of "good cause" was a perception that an ambiguity in the Regulations could result or had resulted in selective banking and discriminatory pricing against independents and various geographic regions, and that agency action was necessary to insure that such pricing practices were not put into effect or continued. 39 Fed. Reg. at 32307 (September 5, 1974). This ambiguity, the agency believed, had been highlighed by an increased supply situation in 1974 which had contributed to a decline in selling prices. According to the defendants, this change in the supply situation had prompted the agency to reevaluate its entire regulatory scheme in mid-1974. Under these circumstances, the defendants continue, the September 5, 1974 rule was promulgated as soon as it reasonably could have been.

Although the eradication of discriminatory pricing practices is an important aim of the regulatory system, it does not follow that the mere existence of such practices, without more, invariably provides justification for issuing rules under the "good cause" exception. To maintain that an agency action in furtherance of regulatory objectives amounts to "good cause" would be to engraft the general rulemaking requirements onto the exception. In order to have warranted the suspension of normal rulemaking procedures under the "good cause" exception, there must have been some type of exigency. Here, there

was no compelling circumstances surrounding the discriminatroy pricing practices cited by the agency. No users had been totally deprived of a supply of motor gasoline, no violence had surfaced or appeared imminent, and, more importantly, no sudden, disruptive change appears to have occurred with respect to either the distribution or pricing of motor gasoline on or about the time the September 5, 1974 rule had issued. *See, e.g., U.S. Steel* v. *EPA*, 595 F.2d at 214 n. 15; *Reeves* v. *Simon*, 507 F.2d at 459; *California* v. *Simon*, 504 F.2d at 440 n. 30.

The Court thus concludes that because it issued without good cause, the September 5, 1974 rule was procedurally invalid, and with out effect upon recoveries under the original three-cent rule. It therefore becomes unnecessary to consider the other challenges to the validity of the September 5, 1974 rule.

C.

The defendants go on to assert, in the alternative, that an equal application rule with a deemed recovery component was validly repromulgated in a rulemaking that commenced on September 10, 1974, and concluded on December 4, 1974. In support of this contention, the defendants claim that the September 10 notice of proposed rulemaking invited comments on the requirement of equal application and on the general matter of unlimited pricing flexibility. The defendants argue further that oral and written comments received during the rulemaking period reflect the industry's awareness that the agency was reevaluating the equal application and deemed recovery requirements.

The Court does not share the defendants' perception of the agency's rulemaking activities between September 10 and December 5, 1974.

Section 4 of the APA requires a notice of proposed rulemaking to include "either the terms of substance of the proposed rule or a description of the subjects and issues involved." 5

U.S.C. § 553(b)(3). This requirement serves the purpose of allowing meaningful comment by the public of contemplated agency action. Hence, "the adequacy of the notice must be tested by determining whether it would fairly apprise interested persons of the 'subject and issues' before the Agency." *American Iron & Steel Inst.* v. *EPA*, 568 F.2d 284, 293 (3d Cir. 1977).

Under this standard of adequacy, the September 10, 1974 notice altogether fails to pass muster. Nothing in the September 10 preamble suggests that the agency was interested in evaluating *de novo* a requirement of equal application of increased product costs in prices below base prices. Indeed, the only notice afforded by the agency concerned only *modifications* of such a requirement, and specifically advised interested persons that the agency was not contemplating the elimination of the requirement. As for the comments actually submitted by interested persons, a fair reading of the administrative record fails to support the defendants' asserting that interested parties were generally aware of the opportunity available to them to comment on the underlying merits of an equal application or deemed recovery rule. *Cf: Wagner Electric Corp.* v. *Volpe*, 466 F.2d 1013, 1019 (3d Cir. 1972).

For this reason, it is apparent that no valid equal application rule, with or without a deemed recovery component, was promulgated on December 5, 1974.

D.

Turning now to the challenges to the May 5, 1977 rule, this Court has determined that no valid equal application requirement affecting the pass-through of increased product costs in actual sale prices and in base prices existed in December, 1974. After examining the regulatory activities during the years 1975 and 1976, and during the Spring of 1977, this Court must further conclude that no valid equal application requirement, or deemed recovery rule, was in effect at the time of the May 5, 1977 amendment.

The Court therefore holds that the May 5, 1977 amendment to the price rule effected a substantive change in the Regulations, and thus should have issued in accordance with applicable rulemaking procedures. Because these procedures were not followed, the amendment was unlawful.

III.

Accordingly, it be and hereby is

ORDERED, that the plaintiffs' motion for summary judgment is granted and the defendants' cross-motion for summary judgment is denied; and it is further

ORDERED, ADJUDGED, AND DECREED, that the original three-cent rule, 10 C.F.R. § 212.83(c)(2), contained no equal application requirement pertaining to the pass-through of increased product costs and it is further.

ORDERED, ADJUDGED, AND DECREED, that the September 5, 1974 equal application rule, with the deemed recovery component, 10 C.F.R. § 212.83(d)(1), was procedurally invalid; and it is further

ORDERED, ADJUDGED, AND DECREED, that the December 5, 1974 cost bank rule, 10 C.F.R. § 212.83(e)(1), was procedurally invalid; and it is further

ORDERED, ADJUDGED, AND DECREED, that the May 5, 1977 amendment to the price rule, 10 C.F.R. § 212.83(h)(2)(iv), was procedurally invalid.

Dated:

Syracuse, New York

HOWARD G. MUNSON
Chief U.S. District Judge

APPENDIX D

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 6 —31

NAPH-SOL REFINING COMPANY,
Plaintiff-Appellant,

v.

MURPHY OIL CORPORATION,
Defendant-Appellee,

Before METZNER, PECK and LACY, Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the Western District of Michigan and was argued by counsel. In consideration whereof,

IT IS ORDERED that the judgment of the District Court is affirmed in part, reversed in part, and remanded for further proceedings consistant with this opinion.

For The Court:

DONNNA M. BOLD, Clerk

By: KAREN S. BERKY
Karen S. Berky
Deputy Clerk

December 20, 1983
(District Court No. G79-14-CA6)

APPENDIX E

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 6 —31

NAPH-SOL REFINING COMPANY,
Plaintiff-Appellant,

v.

MURPHY OIL CORPORATION,
Defendant-Appellee,

Before METZNER, PECK and LACY, Judges.

ORDER

Upon consideration of the Petition for Rehearing and/or Suggestion for Rehearing *En Banc* filed by the Appellee Murphy Oil Corporation,

IT IS HEREBY ORDERED that the Petition for Rehearing is DENIED.

IT IS FURTHER ORDERED that the Suggestion for Rehearing *En Banc* is DENIED. The mandate is to issue February 17, 1984.

For The Court:

DONNNA M. BOLD, Clerk

By: KAREN S. BERKY
Karen S. Berky
Deputy Clerk

February 10, 1984

APPENDIX F

STATUTES AND REGULATIONS INVOLVED

1. Section 5 of the Administrative Procedures Act, P.L. 89-554, 80 Stat. 383, 5 U.S.C. § 553, provides:

(a) This section applies, according to the provisions thereof, except to the extent that there is involved —

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel, or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include —

(1) a statement of the time, place and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involoved.

Except when notice or hearing is required by statute, this subsection does not apply —

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unneccessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the

rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title [5 USCS ¶¶ 556 and 557] apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except —

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

2. Section 7(i) of the Federal Energy Administration Act, P.L. 93-275, 88 Stat. 100, 15 U.S.C. § 766, provided in pertinent part:

(i) Application of administrative procedure law; judicial review; regulation on state and local agencies. (1)(A) Subject to paragraphs (B), (C), and (D) of this subsection, the provisions of subchapter II of chapter 5 of title 5, United States Code [5 USCS ¶¶ 551 et seq.], shall apply to any rule or regulation, or any order having the applicability and effect of a rule as defined in section 551(4) of title 5, United State Code [5 USCS ¶¶ 761 et seq.], including any such rule, regulation, or order of a State or local government agency, or officer thereof, issued pursuant to authority delegated by the Administrator.

(B) Notice of any proposed rule, regulation, or order described in paragraph (A) shall be given by publication of such proposed rule, regulation, or order in the Federal

Register. In each case, a minimum of ten days following such publication shall be provided for opportunity to comment except that the requirements of this paragraph as to time for notice and opportunity to comment may be waived where strict compliance is found to cause serious harm or injury to the public health, safety, or welfare, and such finding is set out in detail in such rule, regulation, or order. In addition, public notice of all rules, regulations, or orders described in paragraph (A) which are promulgated by officers of a State or local government agency shall to the maximum extent practicable be achieved by publication of such rules, regulations, or orders in a sufficient number of newspapers of statewide circulation calculated to receive widest possible notice.

(C) In addition to the requirements of paragraph (B), if any rule, regulation, or order described in paragraph (A) is likely to have a substantial impact on the Nation's economy or large numbers of individuals or businesses, an opportunity for oral presentation of views, data, and arguments shall be afforded. To the maximum extent practicable, such opportunity shall be afforded prior to the issuance of such rule, regulation, or order, but in all cases such opportunity shall be afforded no later than forty-five days after the issuance of any such rule, regulation, or order. A transcript shall be kept of any oral presentation.

3. The equal application/deemed recovery rule, 10 C.F.R. § 212.83(e)(1) (1975), provided:

§ 212.83. Allocation of refiner's increased costs.

(e) *Carryover of costs.*

(1) . . . With respect to each special product . . . when a firm calculates the amount of increased product costs not recouped, which may be added to the May 15, 1973 selling prices to compute the base prices for that special product in a subsequent month, it shall calculate its revenues as though the greatest amount of increased product costs actually added to any May 15, 1973 selling price of that special product and included in the price charged to any class of purchaser, had been added, in the same amount, to the May 15, 1973 selling price of that special product and included in the price charged to each class of purchaser;

except that, where an equal amount of increased product cost is not included in the price charged to a purchaser because of a price term of a written contract covering the sale of such product which was entered into on or before September 1, 1974, that portion of the increased product costs not included in the price charged to such a purchaser need not be included in the calculation of revenues.

APPENDIX G

Pursuant to Rule 28.1 of the Rules of this Court, Petitioner Murphy Oil Corporation herein provides the following information with respect to parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates:

Murphy Oil Co. Ltd.
Ocean Drilling Exploration Co.
Ozark Fuels Corp.

No. 83-1509

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MURPHY OIL CORPORATION,

Petitioner,

V.

NAPH-SOL REFINING COMPANY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE TEMPORARY EMERGENCY
COURT OF APPEALS

BRIEF IN OPPOSITION OF RESPONDENT NAPH-SOL REFINING COMPANY

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May 14, 1984

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QUESTIONS PRESENTED

This case invlolves a technical procedural challenge to a rule which was issued nearly ten years ago and was rescinded more than three years ago. The petition for a writ of certiorari presents the following questions for decision:

1. Whether the court below properly declined, eight years after the fact, to set aside the Federal Energy Administration's decision, made in September 1974 during the early period of petroleum price controls, that good cause existed to issue a rule without prior notice and opportunity for comment where the rulemaking record, including contemporaneous agency statements, reflects the agency's findings:

   a. that changes in market conditions in mid-1974 had revealed an unintended loophole in the existing price control regulations which permitted a number of refiners to begin discriminating against certain customers (*e.g.*, independent gasoline marketers) by selectively increasing their prices while favoring other customers (*e.g.*, refiner-operated gasoline stations);

   b. that such price discrimination was directly contrary to central policies underlying the price control regulations and, if unrestrained, carried the potential for substantial economic harm; and

   c. that advance notice of rulemaking to close this loophole would have (i) stimulated additional price discrimination by publicizing the availability of the loophole and (ii) permitted refiners to "grandfather in" such price discrimination by entering into long-term contracts with favored customers prior to the effective date of the regulation.

2. Whether the court below correctly rejected petitioner's formalistic challenge to the statement of basis and purpose which accompanied the agency's repromulgation of the rule involved in this case in December 1974, where review of the record convinced the court that the agency's path could reasonably be discerned.*

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*Pursuant to Rule 28.1 of the Rules of this Court, respondent represents that it has no parent companies, subsidiaries (other than wholly-owned subsidiaries), or affiliates.

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No. 83-1509

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MURPHY OIL CORPORATION,

Petitioner,

v.

NAPH-SOL REFINING COMPANY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF IN OPPOSITION OF RESPONDENT NAPH-SOL REFINING COMPANY

STATEMENT OF THE CASE

The decision of the Temporary Emergency Court of Appeals ("TECA") in this case upheld as procedurally valid a regulation which was first issued in September 1974, nearly ten years ago, as part of the Mandatory Petroleum Allocation and Price Regulations, 10 C.F.R. Parts 210 through 212. That regulation, the so-called "deemed recovery rule," was rescinded along with the remainder of petroleum price controls in January 1981, more than three years ago. *See* Executive Order No. 12287, 46 *Fed. Reg.* 9909 (January 30, 1981).

The statement of the case presented in Murphy Oil Corporation's ("Murphy's") petition for certiorari accurately summarizes the procedural history of this litigation. It fails, however, to convey the

regulatory significance of the deemed recovery rule or to place Murphy's challenge to that regulation in context. Accordingly, Naph-Sol Refining Company ("Naph-Sol") provides the following supplemental statement of the case.

A. The Deemed Recovery Rule

The Mandatory Petroleum Price Regulations ("Price Regulations") established limitations on the maximum price which could be charged in any sale of a covered product. With respect to refined petroleum products such as gasoline, the maximum price which a refiner could charge for a particular product was determined by adding (a) the weighted average price at which the product was sold in transactions with the class of purchaser involved on May 15, 1973; (b) the allowable increased crude oil and other costs incurred by the refiner in the month immediately preceding the sale concerned; and (c) the amount of increased costs which the refiner had "banked" from previous months and which were now available for pass-through. *See* 10 C.F.R. §§ 212.82, 212.83(a), 212.83(e) (1981). *See generally Longview Refining Co. v. Shore*, 554 F.2d 1006, 1017 (Temp. Emer. Ct. App.), *cert. denied*, 434 U.S. 836 (1977); *Naph-Sol Refining Co. v. Cities Service Oil Co.*, 495 F. Supp. 882, 889-90, 898 (W.D. Mich. 1980). In fundamental structure, this formula remained constant during the entire period of price controls.

The foundation of the refiner price rule was the class of purchaser concept. The requirement that prices be keyed to classes of purchaser was adopted "to preserve the price distinctions that customarily existed under free market conditions" and to "maintain the price differentials that existed on May 15, 1973 between groups of purchasers which were not similarly situated then and are not now similarly situated." FEA Ruling 1975-2, 40 *Fed. Reg.* 10655, 10656 (March 7, 1975). *See Naph-Sol Refining Co. v. Cities Service Oil Co.*, *supra*, 495 F. Supp. at 889.[1]

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[1]Maintaining customary pricing distinctions among customers was a central feature of petroleum price controls beginning with the Phase IV economic stabilization regulations of the Cost of Living Council ("COLC"). As the

(Footnote Continued)

If refiners had been allowed complete discretion in allocating increased costs among their various customers, the customary price differentials reflected in the May 15, 1973 prices would quickly have been subverted. Accordingly, from the outset, the price regulations also provided that increased costs had to be applied in uniform increments to all of the refiner's classes of purchaser of a particular product when the refiner calculated its maximum lawful prices. This requirement became known as the equal application rule.

The regulations did not require a refiner to allocate all of its increased costs which were eligible for pass-through in a given month; rather, it could choose to "bank" some or all of its costs. Similarly, the regulations did not require that a refiner actually charge the maximum lawful prices calculated under the refiner price rule; it was free to charge *lower* prices. In late 1973 and early 1974, when crude oil supplies were critically short, these elements of the regulations were unimportant, as a practical matter, since refiners were charging the highest prices permitted by the regulations.

In mid-1974, however, when supplies improved, the Federal Energy Administration ("FEA") learned that a number of refiners were engag-

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(Footnote Continued)

official history of the regulatory program, written in 1974 by the former COLC staff, indicates:

> *It was possible under the Phase III system to double prices* for some products in some areas and *to some customers without corresponding increases to other consumers* in their areas. The only requirement was that a firm's overall price increase met the firm-wide tests under Phase III. *Phase IV rules changed all that by outlawing such price discrimination.*

Office of Economic Stabilization, U.S. Department of the Treasury, "History of Petroleum Controls," *Historical Working Papers of the Economic Stabilization Program, Part II* (Washington, D.C.: Government Printing Office), pp. 1262-63. Indeed, protection of independent gasoline marketers such as Naph-Sol from price and supply discrimination by refiners who might favor their own branded gasoline stations was a principal congressional objective in adopting the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751 *et. seq. McWhirter Distributing Co., Inc. v. Texaco, Inc.*, 668 F.2d 511, 523 n.18 (Temp. Emer. Ct. App. 1981).

ing in discriminatory pricing by cutting prices to preferred customers and banking the unrecovered increased costs assigned to those customers, while charging its other customers the highest prices allowed by the price regulations. If permitted to continue, such pricing would have led to the complete disintegration of the class of purchaser principles underlying the Price Regulations.[2] Accordingly, in an August 30,1974 emergency rulemaking, FEA promulgated the deemed recovery rule to make clear that such discriminatory pricing practices were impermissable. 39 *Fed. Reg.* 32306 (September 5, 1974).

The opinion below explained the operation of the deemed recovery rule in the following terms:

> Under the deemed recovery rule, then, the refiner had to pass through increased product costs uniformly among all classes of purchaser or suffer a cost recovery penalty. Specifically, each month the refiner was required to compute its bank of unrecovered costs as though it had charged all classes of purchaser the largest increment of increased costs it charged to any one class of purchaser, even though, in fact, it did not. If a refiner applied increased costs unequally, thus, it had to reduce its bank of previously unrecouped costs by an amount that was larger than the amount of increased costs actually recouped. The refiner, that is, was "deemed" to have recovered costs it, in fact, did not. By penalizing selective price increases, therefore, the deemed recovery rule provided an economic incentive for equal pass through of increased product costs in actual selling prices.

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[2]Such pricing in turn would have undermined the mandatory petroleum allocation program, 10 C.F.R. Part 211, as well. Since all supplies were spoken for under the allocation program, customers unwilling to purchase excessively priced product from their assigned refiners would have had nowhere else to turn; their assigned allocations would thus have become meaningless.

Mobil Oil Corporation, et. al. v. Department of Energy, et al., Nos. 2-40, 6-31 (Temp. Emer. Ct. App. December 20, 1983), slip op. at 10-11.[3]

The deemed recovery rule was thus essential to preservation of a central tenet of the Price Regulations, *viz.*, maintenance of customary price differentials. In the absence of such a rule, a refiner would have been able selectively to apply increased costs to some customers and bank increased costs as to other, more favored customers. As the refiner repeated this practice over time, any semblance of customary pricing differentials—and, indeed, the class of purchaser concept itself—would have vanished.[4] The deemed recovery rule was thus central to the very scheme of petroleum price controls.

B. Murphy's Challenge to the Deemed Recovery Rule

Several aspects of Murphy's challenge to the deemed recovery rule must be borne in mind in evaluating the decision below. First, the deemed recovery rule was issued during the early period of petroleum price controls. TECA, the congressionally designated court of expertise in this area, has repeatedly recognized the "gargantuan

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[3]Pet. App. at 10a. The opinion of the court below is reproduced as Appendix A to Murphy's petition for certiorari. Reference in this brief to the petition for certiorari will be made in the form "Pet. at ______." References to the appendices to the petition will be made as "Pet App. at ______."

[4]This effect can be illustrated by a simple example. Suppose a refiner had only two customers, one a company-operated gasoline station and the other an independent, unbranded gasoline marketer. In May 1973, the price differential between these two customers was one cent per gallon. Assume also, for the sake of simplicity, that the refiner sold 5000 gallons each month to each customer (*i.e.*, 10,000 gallons in total) and that the refiner's increased costs eligible for pass-through each month were $1,000 (*i.e.*, 10 cents per gallon sold.) If the refiner were each month to pass through increased costs only to the independent station and "bank" the increased costs attributable to its own station, at the end of only 6 months' time the one cent per gallon differential between the two customers' prices would have grown to more than twenty cents per gallon, a result which is plainly inconsistent with the policy of preserving customary price differentials.

task" facing the agency during that period.[5] For that reason, in decisions which this Court has repeatedly declined to review, TECA has correspondingly afforded the agency "reasonable leeway" with respect to the procedures it followed in reacting to the rapid and complex changes in economic conditions faced by the country in 1973 and 1974.[6]

Second, Murphy's challenge to the deemed recovery rule was not raised until more than seven years after the rule's issuance, indeed fourteen months after termination of price controls.[7] Thus, the court below observed that in considering the adequacy of the agency's good cause finding, "it is essential to recognize that we are being called upon, some eight years after the fact, to review agency determinations that were, in large measure, of a judgmental or predictive nature." Pet. App. at 29a. Similarly, with respect to Murphy's challenge to the agency's statement of basis and purpose, TECA stated that "we are disinclined, some eight years after the event, to invalidate a rule on the technical ground of a deficient statement of basis and purpose when we can fairly discern the agency's aims." Pet. App. at 38a.

Third, this is not a case where a company has complained that an unfair or new interpretation of a regulation is now being applied against it for the first time. In fact, the deemed recovery rule was both simple and clear; neither Murphy nor any other company has made a contrary claim. Rather, Murphy has presented a *facial procedural challenge* to the rule, alleging "defects" which should have been obvious on the face of the regulations—*i.e.*, an insufficient basis

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[5]*See, e.g., Pasco, Inc. v. FEA*, 525 F.2d 1391, 1394 (Temp. Emer. Ct. App. 1975), which involved a challenge to a rulemaking begun two days before the deemed recovery rule was issued.

[6]*See, e.g., National Helium Corp. v. FEA*, 569 F.2d 1137, 1144 (Temp. Emer. Ct. App. 1977); *California v. Simon*, 504 F.2d 430, 439 *(Temp. Emer. Ct. App.), cert. denied*, 419 U.S. 1021 (1974). TECA early refused to apply a doctrine of "technical absolutism" in weighing compliance with rulemaking procedures. *Id.*

[7]Because of Murphy's unreasonable delay in challenging the deemed recovery rule, Naph-Sol urged the court below to find that laches barred Murphy's arguments. Although strongly troubled by the argument, Pet. App. at 18a-22a, TECA declined to so hold on the theory that "laches does not run against a defense." Pet. App. at 22a-23a.

for waiving notice and public comment and an inadequate statement of basis and purpose.

Nor does Murphy's challenge involve a claim that the industry in general, or Murphy in particular, was deprived of an opportunity to comment on the deemed recovery rule or that the industry did not in fact understand the basis and purpose of the rule. Although the deemed recovery rule was initially adopted without notice and opportunity for comment, its promulgation was followed within five days' time by a rulemaking proceeding in which public comment on the deemed recovery rule was specifically invited. 39 *Fed. Reg.* 32718 (September 10, 1974). As the court below observed, the industry, including Murphy, took advantage of that invitation. Pet. App. at 31a and 35a.[8] Moreover, the agency repromulgated and gradually liberalized the deemed recovery rule with respect to gasoline, following notice and comment procedures, on no less than ten additional occasions between December 1974 and November 1980, when sales of gasoline were exempted from the rule.[9] In short, the dialogue between the agency and the industry concerning the deemed recovery rule was substantial and continuing.

Against this backdrop, it is clear that Murphy's procedural challenge to the deemed recovery rule is purely technical, involving no legitimate claim of unfairness or prejudice, and has been raised eight years after the fact solely to avoid the consequences of Murphy's failure to comply with a rule which it well understood.[10]

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[8]In the court below, Murphy also argued that the rulemaking which immediately followed the September 5, 1974 initial promulgation of the deemed recovery rule was inadequate to *repromulgate* the rule since it did not contain a legally sufficient invitation of comment on the deemed recovery rule. TECA rejected this contention. Pet. App. at 33a-36a. In its petition, Murphy has apparently abandoned this argument, focusing instead on its contention that repromulgation of the deemed recovery rule was not accompanied by an adequate statement of basis and purpose. Pet. at 22-24.

[9]*See* 40 *Fed. Reg.* 10444 (March 6, 1975); 41 *Fed. Reg.* 5111 (February 4, 1976); 41 *Fed. Reg.* 15330 (April 12, 1976); 41 *Fed. Reg.* 30021 (July 21, 1976); 42 *Fed. Reg.* 2288 (May 5, 1977); 44 *Fed. Reg.* 45352 (August 1, 1979); 45 *Fed. Reg.* 28302 (April 29, 1980); 45 *Fed. Reg.* 40104 (June 13, 1980); 45 *Fed. Reg.* 41902 (June 23, 1980); 45 *Fed. Reg.* 72626 (November 3, 1980).

SUMMARY OF ARGUMENT

Conceding that construction of long defunct petroleum price regulations does not present any issues of sufficient importance for this Court's review, Murphy seeks instead to find grounds for review in TECA's alleged misapplication of fundamental principles of administrative law. Murphy's efforts to find conflict between the decision below and prior decisions of this Court and other courts of appeals, however, are unsuccessful.

As to its challenge to TECA's approval of the agency's decision to waive notice and comment when it first promulgated the deemed recovery rule, Murphy asserts that TECA improperly considered matters beyond the rulemaking record, applied a new, improperly broad legal standard for "good cause," and announced a rule of abdication of judicial review of such agency decisions. On all three points, Murphy is wrong. In upholding the agency's waiver decision, TECA considered the reasons which accompanied the rule's issuance as well as contemporaneous statements of the agency, including a Federal Register notice which followed announcement of the deemed recovery rule by five days and which was specifically referred to in the announcement of the rule. In so doing, TECA acted in a manner fully consistent with numerous decisions of other courts of appeals. Moreover, the "new" legal standard applied by the court below was

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[10]Although not relevant to the legal issues before this Court, Naph-Sol vigorously disputes Murphy's contention that Naph-Sol was overcharged under the deemed recovery rule only because Murphy "occasionally," "accidentally" charged other customers a higher increased cost increment than it charged Naph-Sol. Pet. at 7 and n.7. First, upon trial of this case, Naph-Sol expects to prove that Murphy's breaches of the deemed recovery rule were neither infrequent nor accidental. Indeed, the overcharges in this case attributable solely to Murphy's violations of the deemed recovery rule exceed $1 million. Second, while Murphy is correct in asserting that the increased cost increments assigned to Naph-Sol's class of purchaser were

(Footnote Continued)

in fact an established standard that had been applied in numerous prior TECA decisions, dating back to 1974, which this Court consistently declined to review. Finally, TECA did not "abdicate" judicial review of the agency's decision in this case. Rather, it identified the reasons offered by the agency, recognized that they involved predictive judgments to which the courts have uniformly given greater than usual deference, and declined to apply "20-20 hindsight" to second-guess the agency eight years after the fact. In short, TECA applied accepted principles of judicial review in upholding the agency's action in the unique circumstances of this case. Murphy has presented no cogent reason for the Court to review this aspect of the opinion below.

As to Murphy's challenge to the statement of basis and purpose which accompanied repromulgation of the deemed recovery rule in December 1974, Murphy asserts that TECA's opinion is contrary to this Court's ruling in *Motor Vehicle Manufacturers' Assn. v. State Farm Mutual Automobile Insurance Co.*, 103 S.Ct. 2856 (1983). Again, Murphy is wrong. The court below carefully reviewed the administrative record and concluded that, although the explanation offered by the agency was cursory, it could reasonably discern the basis for the agency's action. In so holding, TECA applied the established rule, expressly reaffirmed in the *Motor Vehicle Manufacturers'* case, that a decision of less than ideal clarity must be upheld "if the agency's path may reasonably be discerned." Moreover, TECA concluded that application of this rule was particularly warranted where, as here, the challenge was not raised until eight years after the fact and was purely technical in nature. In this aspect as well, TECA acted responsibly and in accordance with the decisions of this Court and others. No reason exists for reviewing this alternative ground for TECA's decision.

(Footnote Continued)
not the highest assigned to any class of purchaser, they were higher than the cost increments passed on by Murphy to many other customers. Put differently, Naph-Sol was discriminated against by Murphy, although not by as great a margin as some of Murphy's other customers. Murphy systematically practiced price discrimination, the very practice that the deemed recovery rule was designed to restrain. Murphy's protestations that it is the innocent victim of an irrational rule are hollow.

ARGUMENT

Recognizing that TECA's construction of long-since rescinded petroleum price control regulations presents no issues of sufficient importance to warrant this Court's review, Murphy has instead sought to characterize the opinion below as having decided fundamentally important issues of administrative law in a fashion which conflicts with decisions of other courts of appeals and with this Court's decision in *Motor Vehicle Manufacturers' Assn. v. State Farm Mutual Automobile Insurance Co.*, 103 S.Ct. 2856 (1983). Specifically, Murphy challenges TECA's approval of the agency's decision to waive notice and comment when it first issued the deemed recovery rule in September 1974 and of the statement of basis and purpose which accompanied repromulgation of the rule in December 1974. By so ruling, Murphy asserts, TECA has provided an "all purpose escape clause" and a "road map" for all agencies to succomb to the "ever-present temptation" to issue regulations without public participation and without explanation of the basis for their actions. Pet. at 13-14, 18, 20, 22, 24, 25.

In fact, the decision below amounts to none of these things. In upholding promulgation of the deemed recovery rule, TECA applied "garden variety" principles of administrative law in a manner fully consistent with the opinions of this Court, its own prior decisions, and the holdings of other courts of appeals. In so ruling, TECA was cognizant that the rulemakings involved were not paragons of rulemaking procedure; for that reason, it went out of its way to emphasize that it was upholding the regulations only in the unique setting of this case. Pet. App. at 29a, 38a. Under these circumstances, neither consistency with other holdings, importance of the issues, nor precedential significance argue in favor of this Court's review of the decision below. The petition for certiorari should be denied.

1. TECA's Review of the Decision to Waive Notice and Public Comment Was Proper

In upholding the agency's decision that "good cause" existed to promulgate the deemed recovery rule without prior notice and opportunity for comment, TECA canvassed in some detail the reasons proferred by the agency:

> The preamble to the deemed recovery rule explained that the amendment was intended to clarify an "ambiguity" in the Regulations by putting
>
> > all sellers. . .expressly on notice that prices actually charged, and not merely prices calculated as a lawful maximum, must reflect the equal application of increased product costs, except where a pre-existing contract prevents the implementation of such a price.
>
> 39 Fed. Reg. 32306, 32307 (Sept. 5, 1974). Although "most sellers" had been equally applying costs in prices below base prices,
>
> > (a)s an improved supply situation has begun to have a restraining influence on prices, the FEA has become aware that certain sellers have taken the position that they may selectively 'bank' increased product costs as to certain classes of purchaser, for recoupment in a subsequent month, as long as the prices charged to other classes of purchaser do not exceed the maximum lawful price.
>
> *Id.* Such practices "could obviously serve to avoid the intent of the overall framework of the price regulations," particularly the goal of preserving the "customary price differentials" among classes of purchaser. *See id.* The deemed recovery rule was designed to prevent this.

Pet. App. at 26a.

TECA then observed that the agency had waived notice and comment out of conern that advance notice would, by broadcasting the ambiguity in the regulations, stimulate further price discrimation and enable refiners to take advantage of the contract exception to "grandfather in" unequal cost pass-throughs to refiner-operated stations by entering into long-term contracts before the effective date of the regulations:

The FEA promulgated the rule without prior notice and comment, finding that an emergency existed and explaining that:

> [A]s the supply situation becomes more favorable, the incentive to depart from the equal application requirement becomes stronger. Moreover, announcement of these amendments as proposals would highlight current ambiguities in the regulations and could result in sellers seeking to take advantage of that ambiguity or of the contract exception to the regulation.
>
> The FEA has determined that the continuation or initiation of such practices would be injurious to the public welfare, in view of the number of circumventions of FEA regulations and the substantial compliance difficulties which would result.

Pet. App. at 26a-27a.[11]

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[11] With respect to Murphy's complaint that the September 5, 1974 notice did not identify the objects of the price discrimination which the deemed recovery rule was intended to prevent, TECA held:

> The September 5, preamble, it is true, did not specifically mention independents and regions of the country. The preamble, however, stated that a notice of hearings on proposed revisions of the Regulations would appear "in the near future," *id.*, which turned out to be September 10, 1974. The September 10 notice did explicitly indicate that the deemed recovery rule served to protect independents, and regions, from selective pricing. See 39 Fed. Reg. 32718, 32722-23 (Sept. 10, 1974).

Pet. App. at 32a.

After noting that it had held on a number of prior occasions that good cause to waive notice and comment can exist when "the very announcement of a proposed rule itself" can be expected to precipitate the harm the rule is designed to prevent, Pet. App. at 28a, the court concluded:

> Although September 1974 was a period of increasing oil supply, it was still a volatile time, not that far removed from the Arab oil embargo of fall 1973, and far distant from the relative stability in the oil market of 1979 or 1983. Given the changed market conditions in late summer 1974, the relatively recent awareness that this was encouraging selective cost banking, and the policy of preserving the class of purchaser scheme, we are unable to say that the FEA's judgment that notice would lead to price discrimination and pressure on independents and regions was unreasonable.

Pet. App. at 30a. Accordingly, the court upheld the September 5, 1974 promulgation of the deemed recovery rule.

Murphy claims in its petition that TECA's analysis suffers from three flaws warranting this Court's review. First, Murphy argues that TECA should have limited its review of the agency's decision to waive notice and comment to the confines of the September 5, 1974 preamble and that it erred in even considering the Federal Register notice which followed on September 10, 1974. TECA, however, specifically found that the September 10, 1974 notice was a contemporaneous statement of the agency's views, Pet. App. at 32a, a finding underscored by the fact that the September 10 notice was specifically referred to in the September 5 notice. TECA's consideration of contemporaneous agency statements was fully consistent with numerous decisions of other courts of appeals. *See, e.g.*, *Alabama Assn. of Insurance Agents v. Board of Governors*, 533 F.2d 224, 236-37 (5th Cir. 1976), *cert. denied*, 435 U.S. 904 (1978):

> [A] court must not only examine whether an agency's promulgation of a challenged regulation complies with the procedural requirement; it must also determine whether, in light of the nature and content of the regulation and of the

> underlying legislation, *the extraneous material which may be available to explain the basis and purpose of the agency action*, and the quantum of action taken in reliance on the regulation, any procedural flaw so subverts the process of judicial review that invalidation of the regulation is warranted.

(Citations omitted; emphasis added.) *Accord Texaco, Inc. v. FEA*, 531 F.2d 1071, 1079 and n.15 (Temp. Emer. Ct. App.), *cert. denied*, 426 U.S. 941 (1976); *California Citizens Band Assn. v. United States*, 375 F.2d 43, 49 (9th Cir.), *cert. denied*, 389 U.S. 844 (1967).[12]

Second, Murphy contends that TECA impermissibly broadened the scope of the "good cause" exception by holding that good cause may be found where advance notice of the rule will itself precipitate the harm to the public welfare which the rule is intended to prevent. Murphy has cited no decision of this Court or any other, however, which is in conflict with that holding, and TECA's ruling in this regard was fully and expressly grounded in prior decisions of that court. *See Nader v. Sawhill*, 514 F.2d 1064, 1068 (Temp. Emer. Ct. App. 1975); *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321, 1332 (Temp. Emer. Ct. App.), *cert. denied*, 419 U.S. 896 (1974). *See also Reeves v. Simon*, 507 F.2d 455, 458-59 (Temp. Emer. Ct. App. 1974), *cert. denied*, 420 U.S. 991 (1975). Indeed, at least one commentator has characterized the situation in which advance notice will itself worsen the problem the agency is trying to combat as "the strongest case for the good cause exemption."[13]

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[12]Neither of the cases cited by Murphy, Pet. at 14, hold to the contrary. In *Buschmann v. Schweiker*, 676 F.2d 352, 356-57 (9th Cir. 1982), the challenged rulemaking was accompanied by *no* explanation of the agency's decision to make the regulation effective less than 30 days following publication, and the court declined to supply that explanation by reference to another Federal Register notice which had been published almost two years earlier and which did not even mention the subsequent rulemaking. Similarly, in *Kelly v. U.S. Department of the Interior*, 339 F. Supp. 1095, 1100-1101 (E.D. Cal. 1972), no statement of reasons accompanied the agency's decision to waive notice and comment; no question of contemporaneous statements was even involved.

[13]Jordan, *The Administrative Procedure Act's "Good Cause" Exemption*, 36 Ad. L. Rev. 113, 122 (1984). Murphy's assertion that "the court itself recognized that this ruling is a new departure," Pet. at 18, is utterly without

Finally, Murphy contends that TECA "largely did away with. . . the courts' obligation to review the justification" for waiver of notice and comment by announcing "a rule of '*extreme* deference' to agency predictions and 'forecasts' about what kind of injury could result from announcement of a proposed rule." This "abdicat[ion]" of judicial control, Murphy argues, will permit wholesale evasion of rulemaking procedures. Pet. at 22. In so arguing, however, Murphy has misconceived the nature of the holding below.

TECA's conclusion that agency determinations of a judgmental or predictive nature are entitled to greater deference than other determinations by an administrative agency is unassailably well-founded in the decisions of this and other courts cited in the opinion below. Pet. App. at 29a. In so stating, however, TECA did not abdicate review of such determinations. To the contrary, it held that in such circumstances a court must "satisfy itself that the agency explains the facts and policy concerns it relies on, and that, given these, a reasonable person could have made the judgment the agency did." Pet. App. at 30a (citations omitted). In this case, TECA concluded that the agency had met that test.

Moreover, affording deference to the agency's judgment is particularly appropriate in the unique circumstances of this case, as TECA emphasized in its opinion:

> [A]ppellees here urge that there is no showing that in fact independents would be injured during the notice and comment period. In considering this question it is essential to recognize that we are being called upon, some eight years after the fact, to review agency determinations that were, in large measure, of a judgmental or predictive nature.
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support in the court's opinion. Moreover, its prediction that this "broad new" rule will lead inevitably to agency abuse is demonstrably untrue since the rule, even if "new," was first announced by TECA in 1974 and has not resulted in any detectable opening of the floodgates in the intervening 10 years. Indeed, in the only cased cited by Murphy in which the Government apparently cited *Nader v. Sawhill* to justify an agency's failure to permit notice and comment before the effective date of regulations, Pet. at 25, the courts declined to uphold the agency's action.

> Although September 1974 was a period of increasing oil supply, it was still a volatile time, not that far removed from the Arab oil embargo of fall 1973, and far distant from the relative stability in the oil market of 1979 or 1983. Given the changed market conditions in late summer 1974, the relatively recent awareness that this was encouraging selective cost banking, and the policy of preserving the class of purchaser scheme, we are unable to say that the FEA's judgment that notice would lead to price discrimination and pressure on independents and regions was unreasonable. It is easy, in retrospect, to state that FEA's fears were exaggerated. FEA, however, was in a better position in August 1974 to appreciate the economic dynamics of the oil industry at that time than the courts are today; we must avoid being hampered by 20/20 hindsight.

Pet. App. at 29a, 30a. Under the circumstances, TECA's opinion portends no dramatic contraction of judicial review of agency action and is fully in accord with well-established principles of administrative law.[14] No cogent reason for this Court's review has been presented.

2. The Court's Alternative Holding That The Deemed Recovery Rule Was Validly Repromulgated in December 1974 is Fully Consistent With This Court's Decision in *Motor Vehicle Manufacturers' Assn. v. State Farm Mutual Automobile Insurance Co.*

In addition to holding that the deemed recovery rule was properly promulgated on September 5, 1974, TECA also stated that it would have upheld the deemed recovery rule, even if the initial promulgation had been procedurally defective, on the ground that it was validly repromulgated on December 5, 1974, following notice and opportunity

[14]Murphy's remaining arguments concerning, variously, the adequacy of existing law to curb price discrimination (Pet. at 20-21), the meaning of an internal agency memorandum (Pet. at 21-22), and other procedural alternatives available to the agency (Pet. at 18-19, 22) were fully addressed in the briefs and opinion below; no further response is necessary.

for comment, including public hearings. Pet. App. at 33a. Murphy challenges this alternative holding as well, claiming that TECA "simply ignored" this Court's decision in *Motor Vehicle Manufacturers' Assn. v. State Farm Mutual Automobile Insurance Co.*, *supra*. Pet. at 23. Again, Murphy is wrong.

TECA's opinion candidly conceded that the December 5, 1974 repromulgation of the deemed recovery rule was accompanied by only a cursory explanation. Pet. App. at 37a. Nevertheless, by canvassing the September 5, 1974 and September 10, 1974 preambles and the explanation set forth in the December 5 notice, TECA concluded that the agency's reasons for retaining the rule were "reasonably clear: the agency concluded that the needs of regions and independents outweighed the benefits of price flexibility." Pet. App. at 37a.[15]

In so ruling, the court below applied the well established and often employed principle that "even when the basis and purpose statement is cursory, or, indeed, nonexistent, a rule may be upheld when the agency's path may reasonably be discerned." Pet. App. at 37a.[16] Murphy's claim that this principle is "directly contrary to this Court's holding in *Motor Vehicle Manufacturers' Association*" (Pet. at 23) is belied by a simple reading of that opinion. In *Motor Vehicle Manufacturers' Assn.*, this Court reaffirmed its holding in *Bowman Trans-*

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[15]The agency advised the industry that it would continue to consider the issue of the necessity of the deemed recovery rule and would make modifications to the rule as and when appropriate. 39 *Fed. Reg.* 42368 (December 5, 1974). In this respect, the December 24, 1974 notice upon which Murphy so heavily relies (Pet. at 24) is fully consistent with TECA's conclusion that the agency had decided to retain the deemed recovery rule for the time being; all the December 24 notice did was renew the agency's earlier promise that it would continue to weigh the need for modification of the deemed recovery rule. The numerous subsequent modifications to the deemed recovery rule summarized in note 9, *supra*, confirm that the agency made good on its promise.

[16]*See, e.g.*, *American Standard, Inc. v. United States*, 602 F.2d 256, 269 (Ct. Cl. 1979); *Alabama Assn. of Insurance Agents v. Board of Governors*, 533 F.2d 224, 237 (5th Cir. 1976), *cert. denied*, 435 U.S. 904 (1978); *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321, 1333 (Temp. Emer. Ct. App.), *cert. denied*, 419 U.S. 896 (1974); *Courtaulds (Alabama), Inc. v. Dixon*, 294 F.2d 899, 904 (D.C. Cir. 1961); *Hoving Corp. v. FTC*, 290 F.2d 803, 807 (2d Cir. 1961).

portation, Inc. v. Arkansas-Best Freight Systems, Inc., 419 U.S. 281, 286 (1974), that the courts must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Motor Vehicle Manufacturers' Assn. v. State Farm Mutual Automobile Insurance Company, supra*, 103 S. Ct. at 2867. The decision below thus applied a principle expressly recognized in *Motor Vehicle Manufacturers' Assn.*; doctrinally, therefore, the two decisions are consistent.

Moreover, in *Motor Vehicle Manufacturers' Assn.*, this Court struck down the National Highway Traffic Safety Administration's decision to rescind a motor vehicle passive restraint standard because the agency's articulated reason for suspending the standard simply did not support its decision. In short, the Court was unable to discern the agency's path. By contrast, the court below was able to discern the agency's path and, therefore, properly upheld the December 5, 1974 repromulgation of the deemed recovery rule.

The decision below was thus fully consistent with both the holding and the reasoning of the *Motor Vehicle Manufacturers' Assn.* decision. In fact, the only sense in which the two decisions can be said to conflict is that this Court invalidated the agency decision involved in *Motor Vehicle Manufacturers' Assn.* while TECA upheld the agency decision in this case. Such a "conflict" hardly provides any basis for this Court's review. Accordingly, on this ground as well, Murphy's petition is without merit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: May 14, 1984

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No. 83-1509

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MURPHY OIL CORPORATION,
Petitioner,

v.

NAPH-SOL REFINING COMPANY,
Respondent

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The government's brief in opposition fails to meet the issues raised in Murphy's petition.[1]

1. The government does not deny that the court of appeals has expanded the circumstances in which an agency may issue a regulation without prior publication of notice and provision for public comment pursuant to section 4(b)(B) of the Administrative Procedure Act, 5 U.S.C. § 553(b)(B). But the government's assertion that TECA "carefully limited" its decision to the facts before it (Opp. at 21) is not correct. Quite the reverse; TECA held

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[1] The government's opposition, although filed under the caption of No. 83-1515, Mobil Oil Corporation v. United States Department of Energy, also purports to respond to the petition in the present case. *See* government's Opposition at 9 fn. 9 (hereinafter referred to as "Opp.").

The opposition of Naph-Sol in this case does not require response.

that the rule in this case is an expansion of an earlier holding in which a similar doctrine had been limited to "calamitous" circumstances. Now it is applicable even in the absence of "calamitous" circumstances. Pet. App. 28a-29a. The government does not cite any language in the court's opinion limiting applicability of the new principle, and none exists. Given Congress' insistence—obviously highly salutary—that the situations in which an agency may issue a regulation without public notice or an opportunity for comment be kept as few as possible (*See* Pet. 17), a decision like this one is of obvious importance.

2. The government fails to come to grips with the fact that the court of appeals upheld the September 5 rule-making only by relying on material extraneous to the September 5 publication, i.e., the September 10 notice.

The government first tries evasion, claiming that there was no new material in the September 10 notice. Opp. at 16 fn. 13. But that is not what the court of appeals thought. The court specifically noted that the September 5 preamble had not pointed out that the danger sought to be avoided by publication without prior notice was supposed injury to independents and sections of the country; these factors were not mentioned by the agency until the September 10 notice. Pet. App. 32a. The fact that independents were said to be threatened was the heart of the Court's reason for upholding the September 5 rulmaking. Pet. App. 29a, 30a, 31a (text at fn. 21), 32a, 37a. Thus, the point absent from the September 5 preamble was central to the court of appeals' holding.

Second, the government asserts that the September 10 notice was not a "made for litigation" rationalization. Opp. at 16, fn. 13. But that is not the issue. The APA requires that the justification for issuance of a rule without notice and comment be "incorporate[d] . . . *in the*

rules issued. . . ." 5 U.S.C. § 553(b)(B). Since the September 10 notice was not published "in the rules" issued on September 5, it does not meet that statutory requirement, and both the government and the court of appeals have read this requirement out of the statute—a view not only wrong but in conflict with decisions of other courts of appeals (Pet. 14).[2]

3. The government also seeks to avoid the fact that the court of appeals relied on extra-record assertions from agency counsel. Petition at 15-17. The court of appeals upheld the agency's action only because it found that "the competitive viability of the independents" would be threatened, and "severe market dislocations and erosion of the class of purchaser scheme" would have resulted if the agency had provided notice and an oppor-

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[2] Moreover, the fact that September 10 followed September 5 by only five days does not mitigate the mischief in this holding. The September 10 notice did not purport to explain why earlier publication of the rule without notice and comment was valid. It is only logical that if the agency had thought that those matters supported issuance of the rules without notice and comment, it could and no doubt would have said so in the September 5 notice. It is not very difficult to set pen to paper to explain why one thinks that an emergency exists.

The fact is that the agency's true reason for publishing the rules without notice and comment was not that any emergency existed or would be caused by publication of notice; rather the agency thought—wrongly—that its desire to clear up what it said was an ambiguity in its rules would suffice, and that is what the September 5 notice actually said. Pet. App. 57a. It was only in 1980 when the agency realized that this "immediate guidance" rationale was inadequate that its litigation counsel stitched together the patchwork assertion that there had been an emergency (or that one would have been caused by appearance of a notice of proposed rulemaking) in September 1974. Pet. 16 at fn. 12. It was this afterthought that the court of appeals accepted.

tunity for public comment on the rule. (Pet. 16; Pet. App. 27a.)

We showed in the Petition (at 15-17) that these statements have no record support and are only argument of the agency's litigation counsel. In response, the government does not acknowledge or attempt to defend the court of appeals' reliance on these inventions. Rather it simply ignores them and pretends that the court of appeals' holding was based on the blander finding that notice and comment "would lead to price discrimination and pressure on independents and regions." Opp. at 14. It is clear, however, that the court of appeals placed extensive reliance on the stronger conclusions (Pet. App. 27a), and by simply ignoring them the government's opposition effectively concedes that that reliance was improper.

4. The government has no support for its assertion that the court of appeals correctly held that the agency repromulgated the rule on December 5, 1974. Opp. at 19-20. Unable to ignore our showing that no such decision had been made (Pet. 24), the government concedes (Opp. at 6) that on December 5 the agency "deferr[ed]" a decision on the September 10 proposal. In an astonishing leap, the government then concludes that this decision to "defer" action on the proposal was a decision to repromulgate the rule. *Ibid.* In other words, the fact that the agency had decided to keep the rule may be deduced from its statement that it had not yet decided whether to keep it. Despite this nonsense, the government goes on to defend the court of appeals' holding that it could "discern" the agency's reasons for making up its mind on December 5. (Opp. 20).

Two points, we submit, are clear. There was no agency rationale to "discern" on December 5 because, as we

pointed out (Pet. 24) and as the government concedes (Opp. at 6), the agency had not made up its mind and thus had no rationale.

Second, there is every reason for this Court to disapprove the court of appeals' holding that if a reviewing court thinks it can discern the basis of an agency's decision to issue a rule, there was no need for the agency to supply the statement of basis and purpose flatly required by 5 U.S.C. § 553(c). The statute's requirement of explicitness is wise, as this case richly shows. What the court of appeals thought was "obvious" did not exist. The decision below thus does provide an escape route—warmly embraced by the government—from the duties of articulation and explanation that are otherwise imposed by *Motor Vehicle Manufacturers' Association* v. *State Farm Mutual Automobile Insurance Co.*, 103 S.Ct. 2856 (1983).[3]

5. A major theme of the government's opposition is that it is too late to correct any errors made by the agency in 1974. Opp. at 21. The government does not explain why such an argument is fair. Murphy is a defendant and did

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[3] Moreover, the government's repeated assertions that the purpose of the rule was "obvious" (i.e., to protect against discrimination) are not worth much. As the government is forced to concede, before September 5 there already was an agency rule forbidding price discrimination, as well as antitrust laws to the same effect. Opp. 16, fn. 13. The real question is whether the deemed recovery rule, which imposes a grossly overbroad penalty (Pet. 7), was conceded by the agency to be inflexible, "troublesome," and causative of "dislocations in the market" (Pet. 8), and which was criticized by the Antitrust Division of the Justice Department as anticompetitive (Pet. 9), was necessary or wise. These questions were never explicated by the agency (except when it repealed the rule in 1980; Pet. 9), and the court of appeals was untroubled by that fact.

not choose when it would be sued. Pet. 24 fn. 19. It should not be penalized for the delays of its adversary.

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